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# THE RAILWAYS AND THE REPUBLIC

BY

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## PREFATORY NOTE.

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SINCE the first publication of this work decisions by the Supreme Court of the United States have somewhat altered the application of legal principles made on pages 127 and 142-143 of the chapter on "The Law and the Railways." The bearing of the later decisions is briefly considered in a supplementary note to this edition.



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# THE RAILWAYS AND THE REPUBLIC.

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## CHAPTER I.

### THE PROBLEM OF RAILWAY DOMINATION.

A NEW social power sometimes rises to immense proportions before its nature and effects are understood. The full bearing of its heretofore unknown forces upon future generations can then be learned only by experience. The mediæval rulers who first organized their realms into feudal holdings saw only that the barons would afford military protection against savage enemies, and preserve order among scarcely more civilized subjects. But they hardly dreamed of the rise of powerful feudal princes whose power would be greater than the throne from which they obtained it, and who could set up and pull down kings at their will. The men who first wrote pamphlets in favor of education and justice for the lower orders of France could not foresee the terrible outburst of popular strength which was fated to involve in one common destruction both the instrumentalities which had maintained oppression for centuries and the men who had made the first uncertain steps towards asserting the rights of man. Watt could see in the steam which lifted the lid from the tea-kettle a force which might yield man some aid in his labors; but he could not

foresee the immense application of that force to every phase of life. He could not dream of the millions of factories, the thousands of steamships, or the myriads of railway trains that lay dormant in his discovery. Still less could he foresee the darkened skies of Birmingham and Pittsburgh, or the destructive power which would doom hundreds of thousands to agonizing tortures or horrible deaths as the result of cupidity or carelessness in the employment of the power which he found under the lid of that insignificant tea-kettle. Experience can alone reveal the extent of the benefits which new ideas or agencies bring to the world. How much more is it true, that the evils to result from the perversion or abuse of such great forces can only be learned by their actual occurrence. This can be seen from the earliest growth of social organization throughout all history; but the lesson was never written in plainer characters than in the development of the vast railway systems which, in the last half-century, have revolutionized the commercial and social character of the civilized world.

When Stephenson was struggling against prejudice and conservatism, to secure the assent of Parliament to the first-born of the gigantic brood of railways which now dominates the world, he thought that passengers could be carried from Manchester to London at a speed of twenty miles an hour, and had a deep faith that freight could be transported rather more cheaply in this way than by carts and wagons. The reality has surpassed his expectations more than his expectations surpassed the conditions of transportation which he was trying to improve. The Tory squires were panic-stricken at the scaring of the game, the de-



struction of the coaching-inns, and the decadence of the breed of horses, which might result from the new method of travel; and thought it an overwhelming argument against the scheme, to picture the disaster that might ensue if a bull should attempt to butt the locomotive off the track. What would they have said if they could have foreseen that the measure which they were fighting would produce a political and commercial power that would prove greater in wealth and more absolute in influence than the greatest Warwick or Montfort ever known in the old feudal times; that would carry legislatures in its pocket and defy the administration of justice; that would partition the territory of a mighty nation among its members, at one place build up a wealthy monopoly, and at another condemn a thriving industry to utter decay and death? What would they have done if they could have seen the arbitrary and irresponsible power of the great railway magnates, the luxury and vast wealth which they accumulate, the speculative fevers and crises of maddening and universal ruin, the bribery and dishonesty which have formed so important a proportion of the immense railway development of the past twenty-five years? It is well that conservative minds could not conceive such a change, for they would have shrunk with horror from the woes into which mankind was plunging and the loss of all the qualities which society had held dear.

The immeasurable benefits that have been secured to mankind, and especially the unparalleled development of the material resources of this country, caused by the rise of the railway system, have been made the subject for reams of panegyric. Unlike most pane-

gyric, all that has been said of the marvellous work of the railway system and the magical expansion which it has wrought in the population and wealth of the nation is true. It has brought into commercial intercourse the producer of cheap food in Texas and Dakota, and the artisan of the Atlantic states and Europe. It has not only made two blades of grass grow where one grew before, but has increased the industrial production of the land a hundred-fold. All and more than has been written of the magical creation of states, cities, and agricultural communities, the rise of industrial enterprises, and the production of what is almost untold wealth, by the expansion of our railway system, is but a faint picture of the reality whose proportions exceed the grasp of human conceptions. But there is a reverse to the picture which the eulogists do not show. While the enthusiast sees only the increase of wealth and the growth of population which the railroads have wrought, there is a view which is not so pleasant to the observation of thinking men. The other side is presented by the abuses and demoralizing tendencies which have accompanied the building-up of the immense railway corporations of the country.

Having created our Frankenstein and realized its monstrous power, it is time to inquire whether there are any drawbacks to this immense gain, harmful to the republican equality and personal independence which are the foundation of our national character? If it is found that the wealth and influence of the immense corporations created for the improvement of transportation facilities threaten the debauchery and corruption of the legislative power; if it appears that,

instead of simply affording better and ampler facilities to all people alike, discriminating rates and secret rebates have exalted certain localities or certain shippers to prosperity, while condemning their competitors to loss or ruin; or if it is seen that, by the issue of inflated stocks, the manipulation of contracts, or the use of subsidiary corporations to divert profits from the stockholders to their own pockets, the railway managers have unjustly enriched themselves—if any or all of these things are shown to be true, then the question resolves itself into two branches: The first is whether any gain of material prosperity can compensate a nation for placing its commerce in the hands of an arbitrary and irresponsible power, or make good the loss of personal independence and confidence in public equity among those whose business existence is held in the hollow of the railway official's hand? The other is the question whether these evils are necessary accompaniments of the proper growth of the railway business; and if the practices of discriminations, stock-watering, and pooling combinations are separable from the legitimate construction and operation of the railroads, what public measures will secure their permanent abolition and the proper prosperity and security of railway investments?

Of the existence of actual abuses in the railway system of the country there is little room for dispute. The presence of roads constructed upon largely inflated issues of bonds, and of at least one immense corporation which has been built up by the favor of railways to the destruction of its competitors, is too well known to admit of question. But it has been the practice of a very large and respectable class of writers to assert

that the watering of stocks, the making of special rates, and the allowance of rebates, are necessary incidents of the transportation business of the nation, and to argue that the wonderful increase of prosperity wrought by the era of railway extension should offset and condone all the cases of injustice which have arisen in the details of the system. To a certain extent this may be true. The practical influences for the maintenance of special rates, and the temptations to make fortunes by the operation of building railways for a nominal value of twice what they cost, and realizing the profit at the expense of the bondholders, may be too powerful for average human nature to resist. The same argument carried further might suggest a merciful consideration for men who, incited by the hope of fortune, have secured advantages over competing firms by special favors from the railways, and have finally destroyed competition and established a bold and defiant monopoly. We might even make allowance for the men who, having received a gift of an empire in lands and money for the construction of a transcontinental railway, proceed to bribe legislators and buy up public officials to obtain further grants for their corporations, or to prevent adverse action as to the ratification of past donations. The pressure of millions to be made or lost is a mighty force, and the man who sees success in that acquisition of immense wealth which is the ambition of so many of the American people, should, perhaps, find some allowance for the power of the incentives by which he is led to forget the principles of strict equity or ignore the interests of the public. But allowance for the circumstances of the transgressor cannot condone the trans-



gression. If the pressure of circumstances forces a railway company to build up a community or enrich a business enterprise at the expense or ruin of a competing community or firm, there is only the more reason for seeking a greater force which shall insure equal justice to all. If the influences which lead to inflation, stock manipulation, and discriminations are too powerful for individual resistance, there is so much the more need of a stronger power to restrain those influences. If they are inherent in the present constitution of the railway system, then we must seek methods of thorough reformation which shall retain the efficiency of the system while abolishing the injustice and public demoralization. That such reformation will be an arduous and weighty task is beyond question; but the claim that it cannot be done without destroying the railway business is much like the position assumed by those political thinkers of Russia and Germany who hold that the government of a nation cannot be efficient unless absolute and arbitrary power is vested in the monarch at its head.

Nor do the great national benefits secured by rapid railway construction afford any valid reason for sparing abuses which may have grown out of it. No element of national growth can be so perfect that it is useless to inquire whether its workings could not have been made more beneficial. In the case of the railways especially, a critical examination is justifiable, because their projectors and operators have invariably embarked in these enterprises not so much for the public welfare as for their own private enrichment. If the country has had hundreds of millions added to its wealth by railway construction, the builders have also



secured tens of millions for their individual fortunes. This fact in itself furnishes no indictment of railway management; but it does estop the argument that, because of the gain to the nation, public investigation of unjust and inequitable practices should not be made. The question is not whether the railway system has been a public benefit, but whether it cannot be made a greater one? While the nation has gained in wealth and population through the general extension of railways, it does not follow that the wealth could not have been more justly distributed and the population made more prosperous, if railway management had been universally governed by the principles of equity. If the government has secured the settlement of the western territories, the pacification of the Indians, and quick transit to the Pacific coast, by giving the men who built the transcontinental railways the money to build the roads and an empire of land in addition, it is still permissible to ask whether it will not suffice to present the projectors of the next enterprise with the completed railroad, without adding the millions of acres of territory to induce them to take the gift.

The great ideas which shaped the formation of the government, and have made the nation what it is, are, first, the deriving of all power which affects the welfare and prosperity of the community from the popular will; next, the equality of all classes before the instrumentalities of government; the securing to every citizen an equal opportunity to prosecute all branches of legitimate enterprise, and to achieve success or failure solely in proportion to his own ability or industry; and finally, the maintenance of that democratic state of society in which the greatest good is secured by the

most general distribution of education and property among the people, as opposed to the production of a class of highly educated and wealthy aristocrats at the cost of ignorance and poverty to others. Upon these principles the nation has not only grown strong and great in material wealth, but it has wrought a far greater work than the creation of riches, in the establishment of a nation of intelligent, self-respecting, and self-governing freemen. To permit the rise of influences which may destroy that work is little better than national suicide. Such influences prevail when the equality of all persons is denied by the discriminations of the corporations which the government has created. Under them, the increase of national wealth is not distributed among all classes, according to their industry or prudence, but is concentrated among those who enjoy the favor of the railway power; and general independence and self-respect are made impossible, while the prosperity or extinction of business enterprises are dependent upon the favor or enmity of the men who control the transportation routes of the land. It is not to be believed that any gain of wealth can compensate for the loss of personal independence or the depreciation of the national character which the existence of such influences threatens. No upright mind can think that all the wealth, luxury, and power of imperial Rome was a fair exchange for the freedom, bravery, and patriotism of the poorer but far greater Roman republic.

A system which contains the germ of such dangers must not be paltered with. The best and highest interests of the people will not let us look with indifference upon the growth of irresponsible corporations,

which hold a greater power over the fortunes and prosperity of individuals and communities than we have ever intrusted to our government. Even if we admit that the instances are few in which such a power has been used for the enrichment of one person at the expense of the many, its mere existence threatens the public welfare. No men or set of men can be permitted to play the part of Providence over the commerce and industries of the country. If national wealth and growth are only to be obtained at the cost of erecting within our borders the rule of a group of corporation magnates, who shall be railway kings in fact as well as in name, let us rather choose national poverty and national freedom.

The nation is not, however, restricted to such a choice. The alternative is not presented to the American people whether they shall accept the material benefits of the railways, with the attendant evils of arbitrary power, or go without the railways altogether. The question is simply whether we shall accept the railways as they are, or seek to retain them without their abuses. The ultimate power in this land still rests with the people. The government can still exert its regulating control over its corporate creations, and bring them into full harmony with the principles of commercial equality and public justice. Its power to do so has been affirmed by the courts, declared by legislatures, and even tacitly recognized by the railways themselves. For while the discussion of this subject has accomplished little in the way of actually abolishing these evils, it has produced a marked advance in the attitude of railway managers and their public advocates as to the principles upon which they must regu-

late their policy. Eight years ago the right of railways to make such rates as they please was affirmed by nearly every railway man who deigned to take any notice of the complaints of the public. Now, the stereotyped argument which seeks to justify discriminations starts out with the acknowledgment "that every company is bound to perform, with absolute impartiality, absolutely identical services." In the profuse defences of the railway policy made in the congressional debates of 1884-5, I have not yet seen one speech which did not concede the principle that discriminations between shippers were reprehensible, the only question being whether any effective steps should be employed for their abolition. This change in the attitude of the railway advocates has been wrought by the unaided force of public opinion. I take it that public opinion is just as well qualified to decide the question whether these evils require legislative remedy, and to dictate what those remedies shall be.

But, we were told, a year or two ago, in several ably written magazine articles, the proper remedy for all the abuses which grow out of the methods of railway transportation must be the healing influence of the great principle of competition. There is much force in this argument, as pointing out the way to cure the evils; but when presented as an objection to any legislation whatever, it possesses two fatal defects. It first assumes that legislative regulation of the railways will interfere with free competition, which is a wholly unwarranted assumption; and, next, it completely ignores the vital fact that the greatest abuse which calls for legislative interference is the persistent policy of the railways to suspend and obstruct the operation of



competition by all means which their united power can command. The contrast between the immeasurable benefits which competition will bring, and the evils which are produced by its imperfect and unobstructed workings in the existing railway system is in itself a conclusive reason for invoking legislation to defend this great principle against the assaults of railway combination, and to restore the supremacy of the natural laws of trade now trampled under foot by every railway pool from New York to San Francisco. To leap to the opposite conclusion and to assert, because competition is a great and beneficial power, that legislation must permit the work of abolishing it to go on without check or hinderance, is as astounding an instance of false deduction as was ever made in the defense of error.

The argument of all the railway advocates against the general proposition for regulation in the interest of the people is based upon two assumptions. The first is that there are no serious infringements of public rights by the railway system as it is now conducted; and the other is that the proposition to regulate the relations of the railways to the public necessarily involves an attack upon the security of capital invested in railways, and the destruction of their property rights under their charters. The first assumption has taken form in the assertion that the agitation is due to "unreasoning ignorance," as one writer put it; or, to state it in its more courteous form, that the subject of railway rates is so intricate that the general public is not qualified to decide it. The assertion of railway advocates, that the public do not understand the elements which determine the cost of trans-

portation, shows either an utter misapprehension or a deliberate perversion of the claims made by the advocates of railway reform. If there were any serious proposition to fix rigid railway tariffs by law, to and from all stations in the country, or to enact a wholesale lowering of charges, the matter would assume a very different aspect. But no such legislation has ever taken any definite form. What has been urged in Congress and the legislatures, and what is demanded by the welfare of the nation, is that railway charges shall be placed upon a basis of equality to all shippers, and that the rates which the policy of the railways themselves shows to be reasonable shall be applied to all departments of their traffic. To enact the impartiality and equality of railway rates does not necessitate the establishment of iron-bound tariffs, from which the railways cannot depart, and none of the legislation framed for that purpose has contained any such mischievous schedule. To demand that the same method of determining the cost of transportation shall apply to all classes alike, and that the railway managers must not have one standard for such freights as they wish to favor, and a higher one for those which they desire to burden, is not to demand cheaper rates. The agitation is not for lower railway charges or for legislative tariffs, but for the enforcement of the principle that all persons have equal rights, and that all the services of the railways shall be performed with impartiality, and at charges based on the same standard of cost. To answer this demand by pleading the occult nature of the charges of railways, and the general ignorance on that point, is, upon its most favorable construction, a proof that the ignorance of the vital issues in



this subject rests with those who advance that argument.

It is not placing too much reliance on the popular judgment to declare it capable of deciding whether such discriminations as those hereafter cited in the case of the anthracite pool and the Standard Oil Company are consistent with public welfare. I believe that public opinion is competent to decide the question whether the governmental favors that have been lavished on the railways do not also place them under public obligations to conduct their business consistently with justice and equality. It does not require any great technical knowledge on the part of the common people to see that the payment of \$10,000,000 rebates by the railways to a single oil refining corporation in sixteen months is a vital attack upon the independence, and even the existence, of its competitors; and on this point the public judgment seems to deserve more reliance and respect than the judgment of the officers of the great trunk lines. In short, it is not essential to possess a technical knowledge of all the details that contribute to the making of a special rate, to know whether discriminations are consistent with justice, right, and the public welfare.

As to the second point, if any schemes of confiscation are proposed, it will be a public duty for every writer to expose them. But such exposure should not be weakened by claiming for the railways property rights which are not granted by the law, and which have been denied by the courts. Nor should their advocates represent every plan for their regulation as an attack upon the security of their property. Those who seek to check the abuses of a system

in their inception, by measures which will maintain the system in its best form, are doing the most to preserve it in security; while those who try to leave the evils unchecked are taking the surest course to arouse a popular storm which may some day sweep away the rights of property in the railways at the same time with their abuses. It was the fashion among the dominant class in France, during the eighteenth century, to regard the agitators in behalf of popular rights as assailants of order; but the real cause of the terrible storm, which destroyed both the oppressions of government and the government itself, was in the determination of the aristocracy to maintain their power for oppression. The lesson should not be lost sight of in the discussion of the existing problem. If the remedies are inadequate, it is well to show their inadequacy. If they are mischievous, they should be exposed and denounced. But the effort to go so deeply into the causes of the evils as to make it clear how they may be dug up by the roots is not to be cried down as an attack upon railway property. The security of the railway system lies in administering it with careful respect to justice and the public welfare. Its greatest danger lies in making its oppressive hand felt by the people, until the popular spirit is goaded into revolt. The history of the past ten years contains one evidence that the working classes can be inspired to an unreasoning but furious attack upon the property of a great corporation. The experience of 1877 should warn us that safety lies in establishing principles in railway management which shall protect the rights of the humblest shipper against the encroachments of the most powerful, and uphold the obligations of the rail-

ways to the people as zealously as it protects the property of the corporation against the blind fury of a hungry and desperate mob.

No fair view of this subject will refuse to recognize the vital fact that, to maintain the commercial benefits of the railways, their ability to yield fair profits to investors must be preserved. No gain will be secured by making the function of transportation a gratuitous one. The efforts at reform are not opposed to the interests of legitimate railway capital, as has often been asserted by the accredited representatives of railway capitalists. The history of the past ten years, with its rapidly alternating eras of railway expansion and railway shrinkage, bringing at one time inflation and speculation, and at another depression and general wreck, does not present the prevailing methods of railway business as affording perfect protection to the interests of the ordinary investor. When we reflect on the panics that have been produced by the reckless and dishonest manipulations of railway property, it does not appear that the security of capital is at all threatened by the inquiry whether such abuses cannot be prevented. If the ability of railway managers to divert the profits of the railroad to their own pockets by fast freight lines, construction companies, and other devices of that nature, were utterly abolished, the change ought to be a benefit to the capital invested in the road rather than an injury to it. The fact is that the outcry against all railway regulation, as attacking the legitimate profit of railway investments, has failed to draw the very important distinction between the illegitimate profits of the managers and the legitimate returns on the actual capital invested. The

needed remedies might impair the power of railway presidents and directors to lay up fortunes of millions out of yearly salaries of thousands; but that a state of things which would make the rates of the roads steady and equitable, and their business correspondingly enlarged and unfluctuating, would injure the shareholders' investment, is about as credible as that the suppression of lotteries would inflict a loss upon the depositors in the savings banks.

A determined optimism appears in the manner with which railway advocates assert now that whatever principles ought to prevail in the railway management do prevail, and now that whatever do prevail ought to. But when the measures to protect the public are under consideration this optimism disappears. "The questions thus presented," say the dissenting judges of the Supreme Court, in the granger cases, "are of the greatest importance, and their approval must materially affect the value of property invested in railroads, to the amount of many hundreds of millions, and will have a great influence in encouraging or repelling future investments in such property." This prediction has been quoted in connection with the oft-repeated charge that the attempt to regulate railway abuses by the granger acts of the western states was the cause of the panic of 1873. To rely on this argument is simply to beg the question. A study of commercial history will find the cause of that revulsion, not in legislation adverse to the railways, but in the ability of railway adventurers to construct railways ahead of development, and on that insecure foundation to create magnificent fabrics of inflated stock valuations. With the granger legislation as subsequently modified, in



force for twelve years since that financial storm, the rage for railway building has again set in, and the same result of inflating the bubble to the point of bursting has been repeated. In the business history of the last fifteen years, the one lesson that stands out most clearly is that the danger to capital in railway investments is not the interference of legislation, but the manipulation of railway adventurers; and it is by limiting railway management to the performance of public duties and to the earning of honest dividends for their shareholders that the greatest security will be afforded to legitimate investors. It is worth while to notice here that the prediction of the judges of the Supreme Court who dissented from the granger decisions was not fulfilled in the sense of preventing the extension of railways. On the contrary, the states affected by that decision have since then been prominent examples of the rapid expansion of the railway system.\*

Suppose that it were true, as these jurists and writers claim, that by the assertion of the public right to regulate the railways the value of their property is decreased, are there no other property rights involved? Do railway investments form the only property in the land which requires the protection of the law? Are we to understand these judges and their endorsers to mean that, because railway property will

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\* In Illinois the mileage of new railways during the four prosperous years of the era of expansion, from 1879 to 1883, was 1488; during the four years of the corresponding era, from 1871 to 1875, it was 1205. In Wisconsin the growth in the four expansive years after the granger decisions was 1143, against 841 in the four years of railway growth before that decision.

depreciate if certain principles of justice prevail, therefore justice is to be set aside for the benefit of railway property? If the magnitude of interests involved is to be of weight in deciding such questions, let us put against "the hundreds of millions" of railway property on the one side the thousands of millions of private property on the other. Railway regulation, according to a writer in the *Princeton Review*, is "confiscation of railway property," but this puts wholly out of the question the idea of that confiscation of private property which is rendered possible by leaving unchecked the power of the railways over commerce and manufactures through the manipulation of freight rates. Of the two parties in interest the shippers represent far greater property interests than the carriers, although the latter, by their organization, are more powerful. I have yet to hear of a single case where restrictive railway legislation has seriously damaged the honest valuation of any railway. I have yet to learn of any seriously proposed scheme of regulation that has proposed to cut down railway profits below a fair dividend on the capital actually invested. But the entire nation knows of one notorious case in which the discriminating policy of the leading railways of the country has resulted in the wholesale confiscation of private property for the benefit of a favored corporation; while less famous cases will be alluded to in the subsequent pages. In view of the fact that the only confiscations which have taken place have been those in which the railway managers have been the offenders rather than the victims, might not this horror of confiscation and disturbance of property rights be justly felt in behalf of the private property of the land,



which is to-day largely at the mercy of railway rates?

In order to give much weight to the arguments by which they oppose governmental regulation, the railways should make their practices accord with the principles which they profess. When the declaration that the elements of cost of transportation are beyond the public comprehension is coupled with the widespread practice of disregarding the cost of service on important classes of their traffic, the natural conclusion is that the railways have one class of principles for public use and another for the conduct of their private affairs. If it appears upon examination that the argument for leaving railway abuses to the corrective influence of competition, without any legislation whatever, has been urged concurrently with the general effort of railway management, all over the land, to organize and maintain combinations for the express purpose of preventing competition, what other inference can there be than that such logic is used to perplex and obscure the general judgment? But these striking contrasts between railway pleas and railway practices are thrown into the shade by the last formulation of railway opinion on the views of the governmental duty to the corporations. It has been argued for years that the subject is so delicate and vast that it must not be touched by legislation in the public interest. To protect the rights of the ordinary shipper against the favorite of the railway would so hamper the operations of trade, it has been repeated times without number, as to take away the independence of the railways and destroy the freedom of competition. Yet, after years of argument that government has no constitutional power to

interfere with the railways, and of demonstration that all such interference must be ill-advised and injurious, the railway logic comes to the surprising climax of appealing to legislation for the aid of the law in upholding their efforts to prevent competition. After maintaining that the state must not protect the public against the inequitable practices of railways, the railway argument resolves itself into an appeal to the state to protect them against themselves. Such a theory of legislation implies that the public rights are of no importance beside the wishes of the railway managers. The practices of the railways are alleged to be too just and equitable to require any defence; but they must be restrained to save them from their own recklessness and disregard of business principles. The law must not, by any effective measures, uphold the right of all persons to equal privileges and impartial charges; it cannot forbid the creation of vast monopolies; it cannot check the formation of combinations to control the movements of the great staples, or protect the freedom of competition in all the branches of transportation. On the contrary, its aim must be to uphold the combinations by which competition is obstructed. To such an astounding proposition the answer of the public should be plain. The first business of the state is to guard the people against the abuses of its corporate creatures. If the principle of enlightened selfishness is not sufficient to keep the railways from destroying themselves, it surely cannot protect the private interests that are subject to their power. To deny the right of restraining that selfishness, when it is confessed that the railways are so little enlightened in its exercise as to need the help of the law to

keep them from ruining themselves, is the fantasy of corporate blindness.

The inquiry, what remedy will cure these evils? necessitates a careful review of the entire subject. It is necessary, first, so to study their nature and causes as to learn whether they are inherent in the transportation business, or whether they have grown out of methods that are susceptible of reform without utterly revolutionizing the system. The next step will be to inquire into the power of legislation to cure them. It is an important question whether the legislatures which have created such immense commercial and social powers as the railways have placed beyond their reach the right to restrain and correct the abuses of the power so called into existence. It is a grave matter whether we are to be confronted with the alternative of either submitting to the arbitrary rule of corporate bodies, like that of the Central Pacific in California and Nevada, or of overturning that tyranny by subverting with it the system of law on which it is founded. But when we find, as we shall, that the fundamental principles of law on which the existence of these corporations rests, secure to government the right to regulate its creatures, then the question comes next, what remedy will at once cure the evils, preserve the usefulness of the railways, and protect the legitimate and honest investments of capital in the railway corporations? If the plan of regulation contains the element of confiscation or destruction of the railway property, it is not for the public benefit. If it is simply restrictive of the dangerous powers of the railway corporations over commerce, but leaves those powers still existing, with only a frail legislative barrier between

them and their subjects, it is inadequate. What the matter demands is the application of remedies which will wholly abolish the causes of discriminations, and, at the same time, retain for these great instrumentalities of trade their character as useful highways of commerce and their availability as sound and remunerative investments.

This work will attempt to show that the power now left in the hands of the railway managers, to change their rates so as to discriminate in favor of one set of shippers and against another, or to manipulate the business of their corporations so as to affect the stock market, is a dangerous and intolerable threat to commerce, to investors, and to the whole social fabric; that the exercise of this power is not only contrary to the spirit of our laws, but that it is wholly opposed to the fundamental principle of the laws by which these corporations were created; that in the power of the government to establish and maintain public highways lies a thorough remedy for the existing evils; and that when the obligations of the railway are enforced by making it a public highway in fact, instead of as a legal fiction, then we may look to see the great principle of competition work so freely that wild fluctuations of freight rates, the injustice of special rates, the restrictive influence of pools, or the creation of monopolies and the crushing out of independent industries by discriminations, will become as impossible on the railways as it is upon our lakes, rivers, and canals. The principles which should govern the conduct of all great enterprises, the maintenance of public rights, the freedom of commerce, the subordination of corporations to the spirit and letter

of the law, are eternal. The preservation of the freedom of competition, the integrity of the commercial and popular character, and the prosperity of the masses, the restraint of arbitrary power and of corrupt or mercenary influences, will always be among the highest aims of human society. All these issues are involved in the problem of railway regulation, as it presents itself to-day, and its earnest consideration should not be neglected while any power for evil is left in the unrestrained and gigantic corporations.



## CHAPTER II.

### TEN YEARS OF DISCRIMINATION.

THE power of railway managers to foster or to injure particular traders, branches of business, or sections of country, by discriminations in their rates of freight, is a momentous element of "the railway problem." The extent of this power, in any case, depends on the proportion which the cost of transportation bears to the total value of the article transported. Where the charges for freight, in the aggregate, amount to less than the average profit of the dealer, discrimination in rates by public carriers can only affect the distribution of such profits. But where the discrimination in freight charges exceeds the profits, it carries with it the extinction of profits for one, with probable ruin if kept up long enough, and, on the other hand, certain fortune for the other. The same may be said of two rival cities or sections competing in the production of any great staple. Other things being equal, the power of the railroads can, if it is persistently exerted, condemn the industry of one city to decay and stimulate the other to activity. Many interests are, by the character of their business, protected from any direct action of the power to discriminate on freight charges. The jeweller, the bookseller, the dealer in costly fabrics, the banker, or the retail dealer generally, and a vast list of similar interests, pay freights which are so small



in proportion to their net receipts, that no discrimination in rates can materially affect them. But there are few which can escape the indirect effect of an unscrupulous exertion of the power to discriminate in the transportation of the great staples which make the fundamental factors of any trade. Nearly all of these leading interests are at the mercy of the power to make unequal rates, which at present is left, with comparatively slight check, in the hands of the railway officials. In manufacturing iron, coal, and steel, the element of freight charges in the cost of product is several times the average profit. In the shipping of the great grain staples a certain profit of two or three cents a bushel will assure fortune to any enterprising man, but rates of freight from Chicago to New York, in 1884, varied more than ten cents per bushel in sixty days. Where the higher cost of merchandise represents a greater expenditure of labor, as in the manufacture of machines, tools, or glassware, and the wholesale trade in groceries and dry-goods, the power of the railways is less absolute, as the proportion of freight charges to the profits is less important. But even these interests may be vitally affected by persistent discrimination. It cuts down the profits of one competitor and enhances those of another; and thus acts as a perpetual disturbing force in trade, against which sagacity, energy, and integrity contend in vain.

While the deliberate and unscrupulous use of the power of railway officials for selfish purposes is an evil of which the system is capable, it is not, of course, believed to be a general practice. It cannot be alleged with any degree of fairness that the majority of the railways voluntarily enter a policy of discrimination,

or that all of the discriminations which have existed were prompted by the intention of the railway manager to favor his own business connections or any one else at the expense of the general shipper. But discriminations which arise under the ordinary workings of the railway system, and without intentional favoritism, may effect ruinous injustice as certainly as if they had been planned for the purpose. When a railway has a thousand cars ready to be loaded at Chicago or St. Louis, and a rival offers to take the grain to the seaboard for half the usual rate, the pressure upon the first road to make an equal reduction is probably too powerful for resistance. The cut will make a lower rate to New York and Philadelphia than to Pittsburgh at half the distance, and will force the Pittsburgh workman to pay more for his bread than his competitor on the seaboard; but it is forced on the railway manager by controlling circumstances. So also in dull times, when a railway manager is in doubt about earning enough to pay the interest-charges and dividends upon the bonds and stock of his company, if a great shipper comes to him and says, "I will guarantee your road enough freight to make the profits secure, if you, on the other hand, will agree to make a prohibitive rate against all my rivals so that they shall be shut out of the market," the temptation to the railway manager to exert this power, if he has it, is greater than any human will, trained to the supreme business purpose of money-making, is likely to withstand. Yet from exactly such involuntary beginnings the most burdensome and iniquitous discriminations have grown. Some of these, begun under overwhelming pressure, have grown to a steady and tyrannical exertion of the

discriminating power, and some have been kept up merely because they are still a necessity from the present constitution of the railway business. In either case the effect is the same, an arbitrary power presses with injustice and inequality upon the commercial system of the country.

Even where no such discriminations now exist, the fact that they have at times existed, and that the power to renew them remains unrestrained, demands either a restraint upon them or the elimination of their causes. It is therefore important, while reviewing the extent and character of the discriminations that have existed, to determine how far they are due simply to the arbitrary will of the men who fixed the rates, and how far they are produced by external and perhaps irresistible influences. Before commencing this work of examining the extent and character of discriminations, it is necessary to say that such an examination cannot be exhaustive. Vast numbers of the minor and petty inequalities in railway rates have never been brought to light. Even of those that have been made public, a complete list would exceed the limits of this work. The evidence with regard to the discriminations in a single state, furnished by the legislative investigation in New York, occupies nearly 5000 pages. All that can be done in this work is to review the leading and most important instances of discrimination under their general classification of—(1) discrimination between different classes of freight; (2) discrimination between different localities; (3) discrimination between individual and competing shippers in the same branches of trade.

The discrimination in the classification of freights is

probably the most universal, and at the same time the least injurious, of all the discriminations practised by the railways. There is hardly a railway in the United States that does not charge more for the same service and risk on one class of goods than another. Most of them spring, more or less directly, from the rule which obtains in the vast majority of freight tariffs, of "charging what the freight will bear," or, in other words, of decreeing that if the profits of one line of trade are greater in proportion to the amount of its freight charges than those of another, the more profitable class shall be assessed a heavier rate and be compelled to pay more for the same service to the railways. The frankest avowal of the lack of rule which governs this subject was made by Mr. Albert Fink, before the Railway Commission of New York. "Classification," said this high authority, "is always arbitrary," and, for this reason, he and the railway powers which he represents declined to amend the tariff by which they charged one wholesale trade twice as much for the same service as they charged another. The example is one of the most recent, and having especial prominence by reason of the interests involved, is appropriate as an illustration of this class of discrimination. The respective classifications of domestic dry-goods and groceries imposed, in 1883, a rate of 75 cents per hundred pounds on domestic dry-goods from New York to Chicago, while the rate on coffee or sugar by the car-load was 35 cents per hundred pounds. The representatives of the dry-goods interest urged that it cost no more to haul a car-load of cotton fabrics from New York to Chicago than it did a car-load of coffee; that dry-goods were cleaner,



more easily handled, and less liable to damage than sugar or coffee; and, finally, that the profit on domestic dry-goods was notably smaller than on almost any other class of wholesale trade, and furnished no justification for the policy of making it bear twice as large a proportion of the railway charges as other lines of trade. A hint as to the source of this difference was conveyed by the statement that it arose from a classification established during the war, when domestic sheetings were worth \$400 or \$500 a bale, and was continued when their value was reduced to \$50 a bale. To these arguments the reply of the railway officials was that the railways were already carrying goods as cheaply as they could, with due regard to returns on their capital. This might have been a fair argument in favor of retaining the average of their rates; but it utterly avoided the merits of the question involved in maintaining a discrimination in classification which imposes a burden of freight charges on one class of merchandise more than twice as great as on another. Although the New York State Board of Railway Commissioners decided that the discrimination was indefensible, and recommended a change, the railways refused to comply with the recommendation, claiming that the matter was beyond the power of the railway commissioners because it pertained to interstate commerce. And the power of the railways over the legislature of that state is so great that the aggrieved merchants had no encouragement to ask the legislature to enforce upon its own corporate creatures the recommendations of the tribunal it had established to remedy such evils.

A vital discrimination in rates was made several

years ago, between materials for the manufacture of iron in Pittsburgh and grain from the Western cities. The comparison noted below is based on the figures for that period, and the details may have changed somewhat since then. But the discrimination in the open rates still exists, and the illustration of its character in 1876 to 1878 is pertinent to our purpose. The freights mainly carried for a manufacturing city like Pittsburgh are the cheapest that a railway can transport. Pig iron, ore, and coal are loaded and unloaded by the shippers and receivers, are transported in flat cars, and require no protection from the weather while in transit or at the end of the route. Yet the rate per ton per mile upon these freights, which furnish the foundation of the business of Pittsburgh, has ranged from two to five times as much as the rate on grain and breadstuffs from Chicago to New York.\* This discrimination was supported by the usual plea of the greater desirability of the grain traffic, in its affording the longer haul and the larger volume. But the principal factor which makes the longer haul preferable was removed from this case by the fact that the terminal expenses, whose proportion to the charges is generally less in that case, were borne by the shippers on both

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\* The average charge on the pig iron shipped to Pittsburgh in 1877 made the rate per ton-mile  $2\frac{1}{2}$  cents; and on ore  $1\frac{1}{2}$  cents. The open rates have not changed since then; and if there has been any correction of this discrimination, it has been done by the resort to another discriminating process in the shape of special rates or rebates. In contrast with this the rate on grain from Chicago to New York, when sustained by the pool at 30 cents per hundred, represents a rate per ton-mile of  $\frac{3}{8}$  of a cent; and when reduced, as it was in the present year, to 10 or 15 cents, shows a rate per ton-mile of  $\frac{1}{4}$  or  $\frac{1}{5}$  of a cent. In 1877 the average pool-line rate was  $\frac{53}{100}$  of a cent per ton-mile.



classes of freight. As to the volume of business represented in the grain traffic, there is no such difference as justifies the difference in charges. Supposing the cost of carrying a given class of freight to be  $\frac{1}{2}$  a cent per ton-mile, a contract of 100,000 ton-miles at  $\frac{3}{4}$  of a cent will yield \$250 net, while one of 1,000,000 ton-miles at  $\frac{6}{10}$  of a cent will give a net profit of \$1000. But this will not justify making the smaller haul pay three or four times as much as the larger. Such a charge indicates, either that the rate charged on the short haul yields a profit two to three times the cost of hauling, or else that the long haul is done at a loss for which the shippers on the short haul are assessed.\* In the case in question the practice simply afforded a discrimination between two different localities. The stress of the hard times in 1877, as in 1884, was laid on the iron industry of Pittsburgh, while the grain shippers of the West escaped some of the burdens.

The difference which should be made on account of the relatively low cost of transporting the freights is illustrated by the charge on grain. The average cost of transporting all classes of freight on the Pennsylvania Railroad, in 1877, was  $\frac{5.5}{100}$  of a cent per ton-mile, while the average charge was  $\frac{9.8}{100}$  of a cent. Grain, which is hardly so much below the average in the first cost of transportation as iron ore and pig iron are below grain, is always deemed profitable by the pool lines at

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\* In this case there was no such difference in the amount of business represented. The pig-iron and ore business of the railways to Pittsburgh amounted, in 1877, to 37,000,000 ton-miles. This is equal to the transportation of 3,500,000 bushels of grain from Chicago to the seaboard. After reaching millions of transportation units the reduction in average cost for additional millions is very slight.

$\frac{66}{100}$  of a cent, or 30 cents per hundred to New York. If the Pittsburgh classes had been placed on the same basis as grain in 1877, leaving their greater cheapness to compensate for the shorter haul, the saving to Pittsburgh would in that year have relieved her mills from much of the loss and shrinkage which they suffered from 1874 to 1878. The effect of this discrimination, as between two different communities, may be noticed more at length when we come to consider discriminations between localities. Its present application is sufficient when we perceive how little respect is paid, in fixing freight charges, to the cost of service and a due proportion of the charges for interest and dividends. If the railways calculated their rates upon the cost of service, it hardly seems possible that they would distribute their charges so unequally. But the fact is that they have been able to maintain their charges on the iron freights, while influences beyond their control, in the shape of water competition and cutting between the railways themselves, have established low rates on grain; so that the iron industries of Pittsburgh are forced by high rates to compensate the railways for giving low rates to the grain shippers of Chicago.

One of the most striking instances of discrimination between classes of freight is that brought up last year by the discussion and adjudication of the respective rates on live-stock and dressed beef. The decision was designed, it was said, to prevent unjust discriminations; but a material and grave discrimination was embodied in the decision itself by the Trunk Line pool. The rule adopted was, so to determine the railroad charges that the cost of transporting beef shall be the same whether it comes to the Eastern market as live-stock,

to be slaughtered there, or as dressed beef which has been slaughtered in the West. In other words, the railway legislature of the country enacts that the man who ships only the meat obtained by slaughtering cattle in Colorado shall have no advantage for the smaller weight shipped over the man who ships the same meat in the live form, with the useless weight of the hides, hoofs, and offal. In order to secure this result, the commissioners recommended that the rate on dressed beef shall be made 75 per cent. more than the rate on cattle, or 70 cents per hundred pounds when the rate on live cattle is 40 cents. This remarkable rule was extolled as "the only just principle," because "the competition between the two classes of traffic is confined simply to the parties who deal in them, the railways remaining neutral, and charging all parties alike for the same service rendered." The absurd assertion that the railways remain neutral, when they take away from one class of traffic the advantage of its device for lessening the cost of transportation, and that they charge all parties alike for the same service rendered, when they charge one class 75 per cent. more than the other for transporting one hundred pounds of freight, could only be made in practical support of a public wrong. The very essence of the question lies in the fact that the shippers of dressed beef have adopted methods which do away with the cost of transporting the useless parts of the animal to the markets of the East. How great an economy this effects is shown by the figures of the Trunk Line commissioner himself. If it requires a charge larger by  $68\frac{3}{4}$  per cent. (allowing for the difference in incidental expenses) to equalize the cost of transportation, the

saving by the shipment of dressed beef is  $34\frac{3}{8}$  per cent. over the shipment of live-stock. This saving means cheaper meat to the consumers of the East, and as increased consumption always follows upon reduced cost, it also means increased production of this class of food in the West. Against the general adoption of this improvement the Trunk Line commissioner takes his stand on the principle that the neutrality of the railroads requires them to destroy the profit of new devices for the benefit of the public and consumers. No more crushing illustration need be given of the utter emptiness of the claim that "the intelligent railway managers" determine their charges by the cost of moving freight.

The remarkable suggestion in defence of this inequality, that railways should assume the functions of a national Board of Health, and discriminate against dressed beef on the ground that it may be unhealthy, needs no comment. Another, which commands more respect considered by itself, is that the cost to the railway of transporting dressed beef is greater than of transporting live cattle. But the exact weight of this plea was shown by Mr. Fink's own figures, which justify an additional charge on dressed beef of only  $6\frac{1}{4}$  cents per hundred pounds.\* The inadequacy of these

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\* The additional cost of refrigerator cars—when they are owned by the railways—and the necessity of renewing the ice in transit, undoubtedly adds to the standing items of cost in hauling dressed beef, as the necessity of unloading, feeding, and watering live-stock does in the live-stock traffic. We have Mr. Fink's authority for the statement that these incidental expenses are larger in the dressed-beef traffic than in the live-stock traffic; but we also have his authority for figures which show that this difference is utterly inadequate to justify the difference in freight rates which he upholds. For he states the incidental expenses, outside of the regular items of cost of hauling, to be  $17\frac{1}{4}$  cents per hundred



pretexts forces us to believe that the real reason why the railways uphold this discrimination is the generally received one that the railway corporations themselves, or the influential railway managers, have large proprietary interests in live-stock yards throughout the country; and that rather than allow these vested interests to be depreciated by the general introduction of dressed beef, they are united in depriving shippers and consumers the benefit of the economy of transportation made possible by the dressed-beef trade.\*

Instances of rates levied under careless or unfair classification could be multiplied indefinitely by the study of almost any railway tariff in the land. But the three instances named amply serve the purpose of illustration. One of them, which originally grew out of a classification occasioned by war values, has recently been upheld by the authority of the Trunk-Line pool; another is enacted and established by the same authority; while the third is embodied in the rates of two of the most prominent railway corporations in the country. The rates on cotton goods simply force that trade to bear a greater share of the railway charges and pay more towards the dividends and interest of the railways than the grocery trade. No such violation of

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pounds on live-stock, and 24 cents on dressed beef. The difference being  $6\frac{1}{2}$  cents, it is plain that if the rate of 40 cents yields a fair profit to the railways on live cattle, the proper rate for dressed beef, calculated on cost of service, is  $46\frac{1}{2}$  cents.

\* These rates have been widely varied since the decision commented upon above, as the pool was able to sustain the discrimination, or as the railways broke away into open competition. The relative influence of competition and combination upon inequalities in rates appears from the fact that, when the railways were competing, the rates on dressed beef came the nearest to equality with those on live-stock; while, when the pool was able to enforce its rates, the discrimination was restored.



private rights as is involved in the driving of one firm or class of firms out of business, for the benefit of their competitors, appears in this instance. The burden, as far as the facts appear, is laid equally on the entire interest. That there is an inequality, and one which, in the present state of the cotton-goods trade, is hard for it to endure, is unquestionable; and being free from the more outrageous characteristics of other discriminations, it affords a very favorable instance for considering dispassionately the question as to the equality of railway rates. To a certain extent the case of the iron rates at Pittsburgh presents much the same aspect, with the additional feature that it levied a great share of the burdens of a very trying business period upon one city for the benefit of others, and that it prevented the manufacturers of that city from seeking the best means of relief. During the years from 1875 to 1878 the cost of iron in Pittsburgh was so nearly that of iron at the English mills that a little economy in the cost of manufacture would have enabled her to sell her surplus iron in competition with English manufactures in foreign markets. The difference between the average freights on the materials and what they would have been if calculated on an equality with the grain rates was \$3.30 on a ton of finished iron. Had Pittsburgh received that advantage, there is no doubt that she could have sent abroad a large surplus of her principal staple of manufacture; and, instead of the idleness, want, and desperation which culminated in the riots of 1877, her working classes would have enjoyed steady employment through all that trying season. The practical edict of the railway rates was, however, that the iron manufacturers of Pittsburgh not only should not have

the benefit of a foreign outlet for their chief staple, but that they should pay rates which strengthened the railways so that they could furnish a foreign outlet to the grain trade at exceptionally low rates. The third instance partakes largely of the character of a discrimination between competing firms or classes of business; and its virtual declaration that the discoverers of improved economic methods for the prosecution of commercial enterprises shall not secure for themselves and the public the benefit of their new devices, amounts to a grave attack upon public rights, and a usurpation by the corporations of power such as no monarch ever wielded under a constitutional government.

Discrimination between different localities or cities involves the daily exercise by railway officials who adjust freight tariffs of a power greater than that possessed by any civilized government—except, perhaps, that of Russia. It is not alleged that the railways regularly and deliberately adjust freight rates in order that one city or section of country may prosper, or another undergo adversity or decay. It may be questioned whether any discrimination of this character ever arose from such a deliberate intention. Its cause, where a cause can be traced, is found in the external and irresistible influences of competition at the points which secure the benefits, and their absence at the points which bear the burden. It is also often true that the very influences which force the railway manager to make the discrimination are the strongest inducements for him to stand by it when it is exposed. A railway which is cutting rates for the purpose of securing traffic at competitive points naturally looks to the sustaining of rates at the non-competitive

points to furnish the sinews of war. So that the merchants or manufacturers whose profits are cut down or who are wholly shut out of market by the discriminations against their community, not only have to endure it, but have, like Isaac, to furnish the fuel for their own sacrifice. The justice of such things wears widely different aspects, when looked at, now exclusively from the standpoint of the railway interest, and again as involving the welfare and equal treatment of the business public. It should also be said that this class of discriminations includes more cases of groundless complaints against the railway policy than perhaps any other. It is natural for the people of any given locality to turn their attention principally to the advantages which their section or city possesses, if allowed a proper development by the railway policy. But the tendency of different sections and cities to plead each its own case has resulted in numerous arraignments of the railway policy, utterly at variance with each other. The patrons of the railways are human, and, consequently, a large proportion of them are fallible and greedy; which results in excessive claims and inconsistent condemnations of the railway tariffs. But the inconsistencies and self-contradictions of the critics do not disprove the instances of discrimination which have involved the prosperity of whole states or even sections of the country, or which have burdened entire cities and secured to their rivals rapid growth and enhanced wealth. Pursuing this class of discriminations into their minor details, examples will be found of such extravagant and eccentric inequalities as produce a doubt whether the whole business of fixing tariffs is not an immense practical joke. In order fully to

appreciate the sublime height of humor reached, such cases must be studied in conjunction with the grave assertion that these are subjects which no one but the trained experts can understand.

The first subject naturally discussed under this head is the discrimination between the grain producers of the West and the agricultural districts of the East. For many years it has been the practice of the railways to charge as much for carrying agricultural products from Ohio, Western Pennsylvania, or Western New York to the seaboard as from Chicago to the same destination. At times the charge for the shorter haul has been much greater, the latest example having occurred during the cutting of rates in the spring of the present year. This has been practically acknowledged by eminent railway authorities, who justify it on the ground that if the western farmers are not allowed especially low rates their products cannot be sold in the markets of Europe. This is a practical claim that the railways should carry western products at a loss, and that other classes of shippers should support them in doing so by paying rates which will yield such profits as to make up the loss on the grain traffic. The idea is absurd, and is never sincerely entertained in the practical deliberations of the railways. The factor which brings the average rate on grain from the West to about half a cent per ton-mile is the competition of the water routes, and the fact that it will at once pay the railways a profit and induce the majority of the grain shipments to take rail rather than water transportation. But if the rate of half a cent per ton-mile from the Chicago or St. Louis elevators is remunerative, what is the obvious conclusion as to the rate



of one cent per ton-mile from the Ohio or Western New York elevator? Simply that while the force of competition causes the railways to accept moderate or even narrow profits on the Western grain traffic, the absence of that force allows them to collect what by comparison are shown to be exorbitant profits on the grain shipped by the farmers of the Eastern or Middle States.

The effect of the advantages given by the railway policy of the last ten years to producers of the West over their competitors in the East has been greater than is generally understood. It would not be singular, when the Eastern and Middle States have been most thickly covered by the railways, and the farming districts are as fertile as ever, that their cereal crops should diminish. That might be the natural result of superior facilities for sending dairy products and fruits to market, and of superior wealth in the production of high-bred stock. But under such a development the value of Eastern farms would increase simultaneously with that of the Western farms. When we find that an actual decrease in the valuation of the farming property of the East has taken place, the inference is unavoidable that there has been something abnormal in the development of the country. Yet this is what is shown by the census returns of the last two decades. The depreciation is thought to have commenced previous to 1870, but its operation is clearly shown in the comparison of the figures of 1870 and 1880. In a decade in which the total value of all farming lands in the United States increased nearly a thousand millions of dollars, or about ten per cent., there was a general decrease in the valuation of the farming lands



of the states nearest to the seaboard markets, and this depreciation in the oldest and richest states is shown, by the census reports, to aggregate, in the Northern Atlantic States, more than \$350,000,000.\*

It hardly needs to be said that where development is uniform, every year should add value to the land located nearest to market. Here, however, we are confronted with the fact that the lands most accessible to the great seaboard cities, and nearest to the foreign markets for our surplus products, have undergone an actual and general depreciation in value. This phenomenon is explained, when we find the railways charging sixty-five or seventy-five cents on a tub of butter to New York from a point one hundred and sixty-five miles away, while the rate from Elgin, Illinois, one thousand miles away, was thirty cents. Consider the effect of similar discriminations throughout the whole list of agricultural products, and the decay of Middle-States farming is adequately explained. The railways have, through the inequalities of their

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\* The depreciation of farming lands which took place in the Northern Atlantic States, while their acreage of improved lands increased, is shown by the following table, taken from the census reports:

	Increased Acreage of Improved Lands.	Depreciation in Value.
New York . . .	2,000,000 . . . . .	\$226,000,000
Pennsylvania . .	1,900,000 . . . . .	68,000,000
New Jersey . .	110,000 . . . . .	67,000,000
Maryland . . .	428,000 . . . . .	5,000,000
Delaware . . .	48,000 . . . . .	10,000,000
Vermont . . .	113,000 . . . . .	30,000,000
Maine . . . .	567,000 . . . . .	2,000,000

Connecticut and New Hampshire lost slightly in acreage, with a corresponding loss in valuation of \$3,000,000 and \$5,000,000 respectively. Massachusetts presented the unique example of a gain of \$30,000,000 in valuation.

rates, placed the farmers of those states practically farther from market than their competitors in the West.

Yet the causes which give rise to this discrimination are plainly external to the management of the railways. Every railway manager has the alternative presented to him of either carrying Western grain at the half-cent per ton-mile, which is about the average rate, or of not carrying it at all. If he does not concede that low rate he knows that the traffic will go to the water routes or to some other railway, and he takes it for the sake of the narrow profit that there is in it. In the present condition of railway ethics it would be expecting superhuman justice to hope that the president or general freight agent would reduce local rates in proportion. They count on the local traffic as a certainty, and while an impartial observer might see that the most permanent prosperity of the enterprise lies in stimulating local traffic by as low rates as are given to through traffic, it is natural that railway officials, who need high local rates to meet dividends and interest charges, should make them as high as possible, without regard to the simultaneous and inconsistent allowance of low rates to through shippers. It is natural, and seems inevitable, in the present constitution of railway management, that the discrimination in favor of through grain should exist; but the fact that such a discrimination has arbitrarily transferred \$350,000,000 of values from the East to the West is so grave that earnest inquiry is demanded whether it is really inevitable.

Prominent among other discriminations between localities is that against the iron business of Pittsburgh already alluded to, which formed so great a factor in the

depression of that industry from 1874 to 1878. This discrimination arose entirely from the fact that, during the period referred to, the iron trade of that city was, as far as westward shipments were concerned, under the control of a single railway combination; while the existence of competition in the freighting business of such competing points as Cleveland, the Mahoning and Shenango valleys, Troy, N. Y., and the Eastern Pennsylvania iron mills over-balanced the natural advantages which Pittsburgh ought to have enjoyed. The lowest rates on the materials used in the manufacture of iron, during that period, were given to the works in the Mahoning and Shenango valleys.\* These discriminations were in force after the Pennsylvania Railroad had made an effort to reform greater ones, and to place Pittsburgh on an equality with the other points deprived only of its natural manufacturing

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\*This comparison is used because the conditions of manufacture were very nearly similar, while those at Cleveland, Troy, and Eastern Pennsylvania were so dissimilar that a comparison of freight rates is difficult. On the hauling of ore to the blast furnaces the charges to Pittsburgh ranged from \$2.95, in the early part of the period named, to \$2.10 at its close, while the charge to Youngstown was \$1.25 at the opening of the period and \$1 at its close. The rates on pig iron shipped from the blast furnaces of these valleys, to Cleveland and to Pittsburgh respectively, an equal distance, showed a constant advantage to Cleveland of from 56 cents per ton in 1874 to 12 cents in 1878. These may seem to be unimportant differences, but when their aggregate is taken in a ton of finished iron it is of vital importance. The total freight charges on a ton of pig iron made in Pittsburgh in 1878 were \$1.90 per ton greater than if it were made in the Mahoning Valley, on an equal mileage and handling. On a ton of manufactured iron in the mills, the discrimination against Pittsburgh was \$2.33. Carrying out the comparison, the total freight charges on a ton of bar iron manufactured at Pittsburgh and delivered at Chicago were \$11.10, while from the Mahoning Valley these charges amounted to \$7.57 on all-rail routes. By the lake and rail route the discrimination was 50 cents per ton greater.

advantages. All other things being equal a discrimination of \$3 per ton would, during that period of depression, have swallowed up the profits of manufacture. But Pittsburgh had the advantage of cheap fuel, and the principle upon which railway freights are assessed is shown by the fact that the Pennsylvania Railroad, in rearranging its charges, obtained an expert's estimate of the advantage possessed by the Pittsburgh manufacturers in the cheapness of coal, and preserved just enough discrimination to practically appropriate that advantage by the excess of rates charged to the manufacturers of that city over its competitors in the Western markets.\*

Here is a rather curious example of the anomalous effects produced by such inequalities. At that period, Pittsburgh, by competitive rates to the East, was enabled to sell a large share of its product in the country adjacent to the Eastern rolling-mills: while the rates from the New York and Eastern Pennsylvania mills to Chicago, being \$1 or \$2 per ton cheaper than from Pittsburgh, enabled them to control the Western market. In other words, by means of its advantages for manufacture and its competing Eastern route, Pittsburgh was enabled to sell its iron almost at the doors of the Eastern mills, while the Eastern mills, by means of their competing Western

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\* The effect of these burdens on Pittsburgh's leading industry was shown by the rapid growth of that industry after the business men had been driven to the construction of a competing line. The aggregate product of iron and steel in Pittsburgh for the year 1878 was 417,147 tons; for 1883 it was 877,881 tons. The first, after four years of discrimination, was 17.6 per cent. of the entire product of the country; the second, after five years of moderate railway competition, was 20.8 per cent. of the iron production of the United States.



routes, were able to sell iron in markets much nearer to Pittsburgh than to the mills supplying them. By means of this peculiar adjustment of rates, there was an utterly useless haul of Eastern iron through Pittsburgh to the West, and of Pittsburgh iron sent East to take its place. Whether the loss by that unnecessary transportation was imposed upon the manufacturers or the railways or the consumers, or divided among all three of them, there is no certain means of determining. It is only clear that an abnormal adjustment of freight rates caused an utter waste of human effort by the unnecessary transportation of some hundred thousand tons of iron several hundred miles.

Another discrimination affecting vast interests, and illustrating in a strong light the principles upon which rates are too often fixed, is that which attracted so much attention last year in the anthracite coal rates to Philadelphia. This is one of the fruits of what is, with one exception, the most successfully managed railway combination in the country, and the facts furnish a rather severe commentary on the claim of several eminent gentlemen that the system of pooling furnishes a remedy for the evils of discrimination. For many years the shipment of coal to the principal cities of the East has been controlled by a combination of the great coal-carrying railways. This combination is complicated by the fact that its members are miners and sellers of coal, as well as carriers from the mines to the markets. It is not necessary at this point to speak of the dangers to legitimate trade arising from the presence of a carrier that engages in the mining business, with the power of shutting its competitors out of the market when necessary to carry



out its own purposes. All that is required here is to notice that the hybrid character of the corporation, hauling anthracite coal to Philadelphia, enabled it, through combinations with other railways, to exact from that city\* considerably more for the anthracite coal produced in its immediate vicinity than was paid by cities one or two hundred miles farther away. Voluminous explanations of this discrimination were made. The heart of the subject was, however, touched by Mr. James E. Gowan when, in answer to a question before a committee of the Philadelphia Councils, he declared, with regard to the fact that his company sold coal in Baltimore at 35 cents a ton less than in Philadelphia: "I have no doubt that the Philadelphia and Reading Coal and Iron Company, like any merchant or any other corporation, must meet the exigencies of the market." In other words, the companies could not altogether control the market in other cities, although combinations had enabled them greatly to advance the prices over those of the ante-pool period; but in Philadelphia their control was so absolute that it fixed a greater price and exacted a

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\* According to the published rates of the dual corporation known interchangeably as the Philadelphia and Reading Railway Company and the Philadelphia and Reading Coal and Iron Company, the price of stove coal in March, 1884, delivered on board vessels at Port Richmond, for shipment beyond the capes of the Delaware, was \$3.90. For delivery within the harbor the price of the same coal was \$4.45, while the price of the same coal delivered by cars to the city yards was \$4.80. It was further shown in the inquiry raised on this subject that on coal for shipment outside the capes a drawback was granted by the railway and coal-producers conjointly, the result being that Philadelphia, at a distance of 90 miles from the coal-fields, paid a retail price of \$6.50 per ton, while New York, 120 miles away, paid \$5.50; Baltimore, 188 miles distant, paid \$6; and Boston, with 354 miles of transportation, got its coal at \$5.70.

greater transportation charge on the coal used at its own terminal city, than on the coal sent to a more distant point. The discrimination in the open rates of the company, between the city retailers and the shippers to Boston or New York, was alleged by the railway officials to be covered by the cost of switching and delivering the cars to the retail yards. As this discrimination amounts to \$6 or \$8 a car, there can be no doubt of its lavish liberality; but it still leaves 50 cents per ton of the discrimination unexplained; while the different charge for exactly the same service on coal destined to points within the Delaware, over that on coal going outside the capes, was 55 cents. Rebates were alleged to increase that discrimination by \$1 per ton, while the fact that New York and Boston, with a greater transportation than Philadelphia, got coal at retail 70 cents or \$1 per ton cheaper, proved that the discrimination did exist to a great amount. On the very plausible hypothesis that the rates which were profitable for the railroads to carry coal destined for Boston or New York would also be profitable if the coal were consumed in Philadelphia, the aggregate discrimination in the item of anthracite coal alone was estimated by a local authority at \$2,878,000 annually. A similar combination of railways was shown by testimony before an investigation of the Philadelphia Gas Trust, to establish a no less decided discrimination on the gas coal furnished to the city gas-works.\*

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\* It is shown in the testimony there, as summarized by Mr. John Norris of the *Philadelphia Record*, that the average price of Pennsylvania and Westmoreland gas coal was less by 50 cents per ton in New York than in Philadelphia; while about as signal an instance of arbitrary discrim-

It is not surprising that the people of Philadelphia considered it grievous and anomalous that a combination of railways, the leading members of which owed their very existence to Philadelphia capital, should impose an annual burden on them, in the single item of coal, of \$3,750,000 in excess of what other cities were charged on the same class of freight. Such a discrimination against any city is a grave matter; but it is especially paradoxical to the Philadelphians that it should be laid on Philadelphia by the railways which Philadelphia has built. Yet it may be doubted if the burdening of any community, by the mere operation of unequal freight rates as between that point and another, contains half so great a threat to public rights as the avowal openly made by the railways in this instance, of the right to impose different rates with reference to the ultimate destination of the freight entirely beyond their lines. When the Philadelphia and Reading declared that it would deliver coal on board schooners at \$3.90 if the schooners carried it to Boston or New York, but would charge them 50 cents more if they carried it to Wilmington or Chester, it assumed a power of arbitrary dictation little short of tyranny. It is not the business of any railway cor-

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ination as any on record came to light in the case of a contractor, who had contracted to deliver 50,000 tons of coal to the Philadelphia Gasworks. By a combination of the Pennsylvania and Baltimore and Ohio Railroads, he was rendered unable to fulfil his contract, the rate of freight being raised \$1 and \$1.25 per ton as soon as it was discovered that the coal which he shipped was intended for Philadelphia and not for New York and Boston. In the statement of the case made by Mr. John Norris to the councils' committee the average discrimination against Philadelphia on bituminous coal was stated to be \$1 per ton, which swelled the aggregate annual cost of the discrimination against the city to \$3,750,000.

poration to control the distribution of any staple after the service of transportation has been performed; and when a corporation goes beyond its own line by the declaration that it will give better rates if the freight is carried to one locality than if it is carried to another, it is but a short step to the arbitrary prohibition by the railways of any delivery of coal to such localities as they may wish to exclude from the general market. How easily that step is taken will be shown farther on, in the consideration of some other features of the coal-carrying business.

In the examples of discrimination hitherto adduced, the difference in rates has been moderate, the magnitude of the interests concerned is of great importance. Not less important but far more striking are the wild eccentricities of railway rates which are found in almost every part of the nation, in the differences on various classes of freight, in the charges for long and short hauls. The almost numberless examples in which the rates to points half-way from the West to the seaboard were greater than for carrying the same freight all the way, were illustrated at Pittsburgh in the period already referred to;\* but they are made commonplace, not only by the frequency of their recurrence, but by the abundance of more

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\* In March, 1878, the rates on grain and flour, from Chicago to Pittsburgh, were 25 cents, while to New York, involving 350 miles more transportation, they were 15 cents. In May of the same year grain was hauled through Pittsburgh to Philadelphia and Baltimore at 18 cents, while if the railways had stopped the freight at that city, and saved themselves the carriage of 350 miles over the mountains, they would have charged 18 cents. These are but specimens which might be multiplied indefinitely, as shown by the New York investigation.—*Report of Hepburn Committee*, pp. 55, 59.



glaring examples of the same sort.\* The instances in which a rate for a given distance has been fixed and maintained at such an excess of the charge for transporting the same freight the same distance and as much farther, in addition, as to make the proportion from three to four times as great, are multitudinous. The examples furnished from the southern, western, and transcontinental lines which have been quoted by high authority and discussed in Congress show their almost universal character.† Those cited from Illinois, Mississippi, and Georgia are striking illustra-

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\* A striking illustration of a similar discrimination against the glass industry was related to me by a glass manufacturer of fruit jars, doing business in Pittsburgh. In the summer of 1876 he made large contracts for the delivery of fruit jars, by car-load lots, in Chicago, Toledo, and Detroit. In order to figure the cost of delivery exactly, he obtained a special rate of \$50 per car-load to Chicago, or, as a car-load of this ware weighs less than 20,000 pounds, 28 cents per hundred. Towards the close of the season he found it necessary to fill some of his orders by buying the ware in Philadelphia, and in shipping from that point found that the open rate was 14 cents, or exactly one half the charge, for nearly double the distance. On a complaint against this remarkable inequality, the rate from Pittsburgh was made exactly the same as from Philadelphia, leaving a discrimination as regards distance of about three-sevenths of the whole charge.

† The case which was heard before the Illinois Railway Commission last year showed a rate of 16 cents on fourth-class freight from Chicago to Kankakee, a distance of 56 miles, while on the same freight to Mattoon, a distance of 172 miles, the rate was 10 cents. This inequality was produced by railway competition at the latter point.

The Winona and Memphis example, which occupied so important a place in the congressional debates, showed a charge of \$1 per bale on cotton from Memphis to New Orleans, a distance of 450 miles; while from Winona to New Orleans, a distance of 275 miles, the charge was \$3.25 per bale. River competition to Memphis was the cause of this discrepancy. Another example of the same sort was adduced in Congress, in a rate of \$1 from New York to Atlanta, while, on the same class, under the influence of ocean competition, the rate was made 75 cents to New Orleans, about double the distance.



tions of the utter disregard of distance which prevails in the making of railway rates as between competitive and non-competitive points; but they cannot present any such astounding triumph over the facts of geography and the cost of service as is to be found in the tariffs of the Pacific railways, as quoted by the New York Chamber of Commerce and referred to in the House of Representatives.\* It would be hard for any one not acquainted with transcontinental geography to comprehend, from the rates of the Pacific roads, that each reduction in the distance for which the freight is hauled brings with it a more than proportionate increase of charges.

No less surprising a result of the eccentricities of railway rates is to be found in the cases which were experienced at Pittsburgh, and are shown by the New York investigation to have been repeated in that State,† where the inequalities of rates have actually

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\*The transcontinental rates, given in the report on discriminations to the New York Chamber of Commerce, are as follows:

New York to Salt Lake . . . . .	\$4.95
“ “ Ogden . . . . .	4.65
“ “ Dillon, Montana . . . . .	3.45
“ “ San Francisco . . . . .	2.25

Other specimens of the fantasies of the Pacific railway tariffs were referred to in Congress last winter, as follows: New York to San Francisco, \$300 per car; to Reno or Virginia City, \$500. The same outrageous rule was also found to be in force on the Northern Pacific, where the rate on hardware from Chicago to Lincoln Station, 100 miles east of Portland, was \$400; to Portland, \$200. The principle, or, rather, absence of principle, on which these discrepancies were based, was that the interior merchants must pay the through rate to the Pacific coast, and the local rate back to the local point, although the goods were dropped at the local point on their way west.

† W. W. Mack, of Rochester, shipped goods to New York, and had them reshipped to Cincinnati through Rochester, and made saving of 14

caused freights to be hauled from the original point of shipment away from their destination to a competitive point, and thence shipped back again through the place where they originated. The waste of this wholly useless haul represents, perhaps, the climax of the persistent stupidity controlling freight rates. The trained and scientific railway management sometimes lauded as infallible might at least have perceived the economy to the corporations of omitting the totally unnecessary haul of seven hundred miles, and, while charging the shippers just the same, allowing them the saving of time by shipping the goods directly from Pittsburgh or Rochester to the point of destination. Indeed, a little liberality might have omitted the wasted haul, and only charged half rates for it. Either of these amendments might have been made favorably to the shippers; but through 1876 and 1877 the railway officials continued so convinced of the utter correctness of their freight charges that the spectacle of a car-load of Pittsburgh manufactures, destined for Texas or California, but commencing its journey by starting in the other direction, on a trip to New York and back

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cents per 100 lbs.; on the same process for a shipment to St. Louis he saved 18 cents per cwt., there being a wholly unnecessary carriage of the goods in each case of seven hundred miles.—*New York Investigating Committee's Report*, p. 55.

A considerable amount of manufactured iron and steel, glassware, and white-lead was to be shipped some years ago from Pittsburgh to points in Texas, California, and other distant localities, and in one case to so near a point as Chattanooga. The rates from New York and Philadelphia to these markets for the articles referred to were so much lower than from Pittsburgh that it effected an actual saving to the Pittsburgh manufacturers to ship their goods by the car-load to New York, and thence to have them hauled back again over the same track through Pittsburgh to the points for which they were destined.

again through Pittsburgh, was a by no means infrequent phenomenon of railway business.

No exhaustive list of discriminations can be given. The typical cases cited suffice to show that gross injustice has been practised on a large scale, and that the power to favor one community at the expense of another has been exerted by the great corporations.

When all these examples are traced back to their source, an examination of the causes which produce them will show that in every case they arise from the imperfect working of competition. Other influences may vary their form or change their aspect; but all of them originally come from the fact that, in one way or another, competition operates in favor of the locality which gets the best rates, while its absence, or the obstruction of its natural influence, prevents the same advantage from being secured at another. In most, if not all, of the important discriminations against localities, the pressure of competition at one point in favor of low rates there, and its absence elsewhere, placing it within the power of the railway management to maintain rates there, constitutes an influence external to the management of any single corporation, and greater than any individual power of resistance. The conclusions from these instances then are: (1) that this class of discriminations has existed and does exist to an onerous and dangerous extent, affecting some of the fundamental interests of the land and establishing practical injustice; and (2) that it grows not so much out of the arbitrary and absolute edicts of the railway managers, as from the present constitution of the railway business, which creates competition at certain points and leaves others

without that benefit, and which also develops combinations for the abolition of competition where it has been pushed to an extreme degree. When these points are established an insight into the fundamental factors of the railway problem is made comparatively easy.

Discriminations in classification are prescriptive and unreasonable; discriminations between localities are burdensome and dangerous; discriminations between individuals are corrupt and criminal. The first class are handed down by custom, and, while sometimes embodying an inequality that is burdensome, scarcely amount to an aggression upon the existence of any industry or trade. The second arise from the necessity of the railways, as generally conducted, and, therefore, rarely involve a deliberate attack upon any community or section. But no such redeeming circumstances attend the fixing of discriminating rates as between individual shippers. It is the most vicious and unjustifiable form of the evil. A railway official who gives one merchant better rates than his competitor must do so with the distinct purpose of securing to the recipient of the favor advantages which the competitor cannot enjoy. The injurious nature of this power is heightened, and the difficulty of detecting its exertion is increased, by its secret operation. The advantages to favored shippers being generally granted by secret rates or drawbacks, the inequality is rarely detected until the injury is done. The same cause naturally restricts the citation of such cases. Indeed, even an approximate estimate of their extent is impracticable. To determine it would require an examination of the books of every railway in the land, and a full statement of the results would fill a library. It



must suffice for present purposes to cite instances which show that discriminations have been made between individual shippers by the officials of leading railway corporations, and that in well-authenticated cases they have been burdensome and ruinous in their character. To prove that such wanton injustice has been inflicted upon individuals by men who still hold the power to repeat the wrong, is to demonstrate the existence of the evil and to show the necessity of a radical remedy. That is all that is aimed at by the present examination of the subject.

The only thorough investigation of this subject by any authority having the power to compel the attendance of witnesses, and to order the production of books, was that made in New York by the Hepburn Legislative Committee five years ago. Attempts at legislative investigation have been made in other states, resulting in a few disclosures; but none of them has comprehensively examined the entire question. The Hepburn committee, however, pushed its inquiry to the fullest extent, and the testimony taken before it on the subject of special rates granted to individual shippers clearly exposes the practice of the two leading railways traversing that state. The proof in these cases was the unimpeachable testimony of the books of the New York Central and Erie railways themselves; and the evidence that the practice was customary was furnished by the admissions of the officials of these railways before the committee. It would be beyond the scope of this work to summarize the cases of individual discrimination presented in the voluminous report of that investigation. We can give but a few instances, taken at random. Transcripts from the



records of the Erie Railway showed that five firms at Binghamton, and the same number at Elmira, obtained special rates varying from five eighths to one third of the tariff rate. Special rates, affording a decided advantage over the regular tariff, were shown in a single report to have been made in thirty-four cases by the Erie Railway, while a similar report as to the New York Central gave thirty-three examples of special rates, containing such noticeable instances as the rate of 9 cents granted to three dry-goods firms of Utica, and 10 cents to another, against tariff rates of 33, 26, and 22 cents, on first, second, and third class freights; while the same rate was given to five grocery firms in Syracuse, which was no slight reduction from the regular rate of 37, 29, 25, and 18 cents on the four classes of freight. Four Rochester grocery firms got special rates of 13 cents while the tariff rates were 40, 30, 25, and 20 cents. The discrimination on dry-goods might not furnish a vital factor in the prosperity of the competing firms; but the wholesale grocery firm which is allowed to get all supplies at from one third to one half the rates that less favored firms are obliged to pay, obtains an advantage which in the long run means prosperity to it and ruin to its rivals. A summary of the regular and special rates on the New York Central shows special rates to be made to individuals at twenty-two points along its line between Albany and Buffalo. The special rates at some points were a little more than one third of the regular tariff, while at Syracuse the extreme of discrimination occurred, a special rate being made of one fifth of the tariff on first-class goods.

Some of these special rates showed a singular disre-

gard of the element of distance, one of 20 cents being made to Little Falls, 217 miles from New York, while that made to Syracuse, 291 miles away, was 10 cents, and that to Black Rock, 455 miles, was exactly the same as to Little Falls. These special rates were generally made for jobbers or large dealers.\* The principle, or lack of principle, on which they were granted was explained by the testimony of the Assistant General Freight Agent of the New York Central, whose duty it is to make such rates and to keep a record of the contracts. He testified that special rates were made "whenever I think them necessary." The object of this action, according to the testimony, was "to help the shippers, as many of them could not live otherwise." This is qualified by the statement that "they cannot compete with western manufacturers." From the same source we learn that special rates are granted to certain parties "on the understanding that they will not ship by canal." The practical operation of this policy is shown by the admission of this witness that one large manufacturer of cotton cloth is charged 20 cents and a small one 25 cents, the schedule rate being 35 and 40 cents. The last detail of the manner in which a leading railway makes its rates tells us, of an important shipper, that he had not the same privilege as a competitor "because he did not ask for

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\* One great wrong of this system is that there is no unit of volume at which one man can ship as cheaply as another. Suppose two merchants at A; one is able to buy one car-load of goods to dispose of it to his customers; the other is able to buy ten car-loads, and he is given a difference in rate equal to a profit in handling the goods, or nearly so. Result, the smaller dealer is frozen out. This supposititious case has its actual counterpart all along the line.—*New York Committee's Report*, p. 64.

it." The extent to which this manner of making railway rates has been carried is shown by the fact that the books of the New York Central Railway, exhibited to the committee, contained over six thousand special rates granted during the first six months of 1880.

It is no more than just to say that the purpose of these multitudinous and inconsistent special rates was stated to be the encouragement of local shippers, who might otherwise be oppressed by the cheaper rates on through traffic. But the fatality which presides over the railway policy appeared to make it impossible to cast out one devil without calling in several worse ones. When the New York Central attempted to remedy the wrong of giving through shippers lower rates than the shippers along its line, it fell into several other wrongs, in its discriminations between the favored shippers and the general public; in its discriminations between the various classes of shippers, some of whom got 10 cent rates, some 20, and some 25; in its dictation to shippers that they should not have the reduced rates, if they shipped any goods by canal; and in the avowal that these favors are granted as a matter of personal solicitation rather than as a matter of public equity and justice.\* There could be no more signal illustration of the unsoundness of the prevailing methods of railway business than that the means which were taken to remove, or, rather, relieve,

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\* He who goes into a railroad office and bargains for a special rate gets it; he who, relying on the equitable treatment which common carriers are bound to give, or not knowing that special rates may be had, delivers them his goods and calls for his freight bill, pays a higher rate.

—*New York Committee's Report*, p. 66.

a discrimination against locality should produce six thousand discriminations as between individuals.

Most of the testimony to other cases of preferential rates between shippers is less direct than that furnished by the New York investigation; but some important ones are proved beyond question. One instance, showing how a great business may be concentrated in the hands of a few favorites of the railway, was disclosed by the arguments of the favored shippers for the continuance of the discrimination. For some years past one of the industrial phenomena of Pennsylvania has been the gradual consolidation of the coke industry of that state in the hands of a few powerful firms. The control by these firms of the entire coke trade of southwestern Pennsylvania could only be adequately explained by railway favoritism; but actual knowledge as to such discriminations was confined to the railways and their favorites. At the last session of the legislature, however, among the opponents of a bill to prevent discriminations, the representatives of these firms appeared, and argued that it was necessary for them to have the discriminations they were receiving, in order to compete with coke manufacturers outside of the state. The argument prevailed with the legislators, who were willing to listen to any logic that the railway interest chose to advance; but two facts put it in a peculiar light. The first is, that the coke production outside of Pennsylvania is unimportant, nine tenths of all the coke in the United States being manufactured in Pennsylvania; the second is, that the bill had no bearing upon discriminations between Pennsylvania shippers and those outside of that state, but provided



only that rates must be equal as between Pennsylvania shippers. In opposing it, the favored firms showed that the discriminations they wanted were against competitors in their own region; and that it was such favoritism as the bill under discussion was intended to prevent, that had enabled them to secure a monopoly of the coke industry, only inferior, in magnitude and glaring injustice, to the petroleum monopoly and the anthracite-coal combination.

Kindred examples of individual discrimination have grown out of the control of the bituminous coal trade by the railways already referred to.\* A former proprietor of large coal interests on the Baltimore and Ohio road testified before an investigating committee that, as he was informed by the General Freight Agent of that company, an agreement had been made with the Pennsylvania Railroad, that no coal from the region of his mines was to be sold between Delaware Bay and Cape Cod, the supplying of gas coal to the cities between those points being reserved to the Pennsylvania Railroad and West Virginia mines. As a result of this agreement the rate of freight on a large contract which this operator had made, to furnish coal to the gas works in New York, was advanced to a prohibitory

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\* These appear, for the most part, under the guise of discriminations against localities, by establishing rates which shut out the coal-mining firms in general from certain localities. One phenomenal case, however, seems on its face to be a most wonderful illustration of discrimination in classification. It enacts that, on coal from the Pittsburgh vein, the rate to Philadelphia shall be \$2.40 per ton if it is to be used for steam-heating; but if it is to be used for making gas, the rate shall be twice as much. The reason for this remarkable rule that the same freight shall pay twice as much, if it is to be used for one purpose, as when it is to be used for another, is the determination of the railroad to preserve a monopoly of supplying gas coal in the hands of two favored mining corporations.



point, and he was forced, at a loss of about one dollar per ton, to purchase coal of the Westmoreland mines, which were favored in the rates. This partakes largely of the character of a discrimination in locality; but its bearing as a case of individual discrimination may be seen in the fact that the unfortunate mine-owner was forced into bankruptcy, and that, at the sale of his mining property under legal process, it was purchased by a prominent director of a third trunk-line railway, who has, as far as can be learned, experienced no insuperable difficulties since then in getting the coal from that mine into market.

There has probably never been a bolder assertion of the power to make individual discriminations than that of the Central Pacific Railway in two of its practices which, besides being matter of common notoriety, were testified to before a legislative committee of California. One is the practice of granting special rates only to those who will bind themselves to ship nothing by sea. This dictation to the shipper of the routes for the transportation of his goods, means simply that if he does not transact his business according to the methods prescribed by the monopoly which controls land transportation, he shall be shut out from equal terms in railway freights. The rigor with which that rule has been enforced in California, and with which the Central Pacific has pursued its policy of buying up or bringing competing roads to an agreement sustaining that perfection of tyranny, is a matter of railway history, and forms perhaps the most striking of the many glaring forms of injustice that have been perpetrated by the public beneficiary which monopolizes the freighting business of California. The other

practice is that extreme development of the principle of "charging what the freight will bear," by which every shipper of silver ore over the Central Pacific is required to furnish an assay of his ore, and to accept a rate of freight in accordance with its value. There may be a strict impartiality in this practice of confiscating the extra value of the product of the mines which may be fortunate or unfortunate enough to yield rich minerals. I have no knowledge as to whether that remarkable practice is consistently carried out; but the assertion of the right to make a special rate for each mine, and to charge one mine twice as much as another for exactly the same service, savors too strongly of arbitrary and unchecked absolutism to pass unchallenged.

A notorious case of individual discrimination arose under the operation of the trunk-line pool on live-stock, in the rebate given to the Chicago "eveners." Between 1875 and 1879, the trunk lines carrying live-stock from Chicago to the East paid a single firm a rebate of \$15 on every car of live-stock shipped to the East. The consideration for which this favor was granted was that the firm undertook to "even up" the percentages of the various lines forming the live-stock pool; that is, if one road obtained, under the ordinary workings of the pool, less than its allotted percentages of the traffic, the firm was to ship enough stock over its line to restore the balance. A concern with an assured advantage over all competitors of \$15 per car, on a business of some hundreds of cars a week, might well undertake to perform this service. It is clearly shown that this firm, for a long time, enjoyed an advantage over its competitors that no energy or economy of theirs could overcome. If the trade was prosperous

the favored firm made \$15 per car more than its rivals; if the trade was unprofitable, it lost \$15 per car less than they. Not only so, but it had the enormous advantage of collecting the same tax on every car of live-stock that was shipped by its rivals. It received from the railways not only an advantage in freights equal to an ordinary business profit on all the live-stock that it could ship, but an income from all the business that its rivals could transact.\* In short, it was assured by the combined power of the trunk-line pool an advantage which in the course of a year or two would guarantee it great wealth; and, on the most charitable explanation of the agreement, that wealth was given to it by the railways out of the higher rates which they were enabled to levy on its competitors by the pooling combination, of which it acted as an agent. It is to the credit of the trunk-line pool that it abolished this outrage upon justice and travesty upon business principles in 1879; but not until this profitable royalty upon the live-stock transactions of the country had raised the favored firm to a commanding place in that trade.

Further instances of preferential rates might be indicated; but the proof of their existence is generally of an indirect character. The clearest proof that such inequalities are general is the common understanding of shippers that the cost of transporting freight depends entirely on the special rate that each shipper

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\* This feature of the discrimination would seem almost incredible if it had not a parallel in the petroleum trade, and if it were not established by the testimony before the New York Committee. (See pages 69 and 70 of that report.) It should be said that the rebate or commission was reduced to \$10 per car, before the abolition of the practice.

can get. A friend who is engaged in the iron-ore trade, when asked the rate on ore from Lake Erie to the iron works of Pittsburgh and the Mahoning Valley, some months ago, replied: "Oh, the open rate is \$1.50 a ton, but everybody gets a special rate, and it all depends on that." In this case, as there are three railways competing for the business, it may be taken for granted that if a shipper cannot get a good special rate from one company he can from another; and it is probable that the competition reduces the various special rates to a practical equality, except, it may be, in the case of those whose relations with railway officials enable them to get their freight carried at less than cost. But the method is vicious, in its assertion of the right to give different rates to one shipper and to the public at large on similar business; and in cases where there is no competition to limit and regulate such discrimination, the shipping public is utterly at the mercy of the railways.

The cases of individual discrimination cited in the practices of the New York roads, of the coal-carrying railways of Pennsylvania, of the Central Pacific Railway in its special contracts, and of the live-stock business, do not prove that the railways commonly and deliberately favor one shipper at the expense of others. But at least two of these instances involve this nefarious abuse; while the fact already referred to, that such favors are always secretly granted, renders it practically impossible to produce instances in such profusion as to demonstrate the general prevalence of the evil. Enough has been said to show, however, that the leading railways make a practice of granting special rates; and that this practice is the exercise of

a power by which they can secure to any shipper a monopoly in any line of business in which the freight charges form a vital element of cost. When that evidence is reinforced by the history of a notorious instance of this discrimination in its worst form, which has defied public opinion and overridden public justice, the case may be considered as closed. The history of the manner in which, by the power of railway discrimination, an immense monopoly was built upon the ruins of a thriving industry; of the persistent and unscrupulous methods by which the favored corporation was raised to unexampled power and wealth; and of the wide-spread demoralization and disaster wrought by this policy, requires a chapter by itself. When that is given, the demonstration, not only that the railways have the power arbitrarily to deal out prosperity to their favored shippers, and adversity to those whom they regard unfavorably, but that they have exerted that power unscrupulously and persistently, against public protest and without regard to public justice, will be complete.



## CHAPTER III.

### THE HISTORY OF A COMMERCIAL CRIME.

VICTOR HUGO tells the story of the betrayal of popular rights and of the erection of an absolute, corrupt, and sycophantic empire, on the ruins of representative government, and calls it "The History of a Crime." In describing an assault on commercial liberty as successful as that of Louis Napoleon upon political liberty, prosecuted by methods as unscrupulous as his, and the establishment, on the ruins of independent industries, of a commercial absolutism as merciless and corrupt as was the political absolutism of the Second Empire, it seems peculiarly appropriate, adapting Victor Hugo's phrase, to entitle the account, "The History of a Commercial Crime." The Standard Oil Company, indeed, embodies the commercial crimes of the past decade. Its vast wealth has been accumulated in less than fifteen years, by speculative manipulations, by bribing legislators, and by distorting law to deny to one man the privileges given to another. Its history illustrates, step by step, the extent to which the greed for wealth can corrupt commercial morality, pervert law, and betray the interests intrusted to its protection. The methods by which this company acquired its power, and those by which it exercises that power, from its greatest operation to the selling of a single barrel of oil, show the baneful results of per-

mitting the exclusive control of a great commercial interest to be vested in a monopoly which can oppress the consumer or the producer alike. Throughout the course of intimidation, corruption, defiance of commercial and statute law, and contempt of public justice that marks the rise of the Standard monopoly, one fact is pre-eminent: This monopoly was called into existence and sustained in its most odious tyranny by the persistent and deliberate discriminations of the railways in its favor. Not only the \$100,000,000 which that corporation has gathered out of the oil trade in the last fifteen years, but its dictatorial power, its unscrupulous crushing of opposition, its corruption of public servants, its control of the speculative features of the business, and the favoritism and sycophancy which are essential accompaniments of its absolutism, are the direct results of the advantages which the leading railways of the country gave it, by carrying its freights on terms which rendered competition practically impossible. So that while greed, dishonesty, speculative combinations, and disregard of private and public rights are all represented in that aggregation of wealth and injustice, it is signally the embodiment of the gigantic wrongs which the railways can inflict and have inflicted through the power of discrimination.

In its inception as a corporation for the refining of petroleum, the Standard Oil Company, formed at Cleveland, Ohio, some fifteen years ago under a charter from the State of Ohio, was not essentially different from its two-score of competitors in the same business. Its capital was \$1,000,000, enough to give it a leading but not a commanding position in the trade, there being many other refiners of equal or even superior

wealth. But it was controlled by men who perceived how one refining company might be made master of the trade by combining the railways, and by binding them to its interests with indissoluble ties. No doubt refiners as well as other business men had long before discerned the advantages to be gained by securing the favor of a railway line, and obtaining special rates for transporting crude petroleum from the oil regions to the refineries, and the refined product to the seaboard or interior markets. But it is generally believed that the mind of John D. Rockefeller first comprehended the value of a scheme to unite the favors of all the railways upon his company. His conception first took form in the famous "South Improvement Company," an organization for the avowed purpose of controlling the freight business of the oil regions. It induced the three principal trunk-lines then engaged in carrying oil to give it, under a secret contract, rebates ranging from 40 cents to \$3.07 per barrel, and was guaranteed "against loss or injury by competition." In return for this favor it was to insure the railways a fair division of the freight traffic of the oil trade. The contract provided also that it should receive a rebate on all oil carried for other parties, which, as no one else could ship oil, in competition with such a favored shipper, appears to be supererogatory. The contract was signed by the South Improvement Company, on the one hand, and by the Pennsylvania, the Erie, and the New York Central trunk lines on the other hand. The premature publication of the scheme proved its ruin. The oil producers of that day were an independent class of men, and were not disposed to seek the thrift that would follow judicious fawning. A storm such as has

never been known before or since, in connection with commercial questions, arose throughout the oil regions. Public meetings, from one end of the district to the other, thundered out defiance. Rather than submit to the yoke of the South Improvement Company, they would burn every tank and raze every derrick in the oil regions. Whether or not the threat would have been carried out, it showed the railways such a spirit as would create other means of transportation if the South Improvement project were persisted in. The attempt to create a monopoly fell, therefore, before the popular clamor.

But the idea remained. The ingenious and persistent mind which had conceived the South Improvement scheme perceived that the work must be carried out gradually, and a control obtained, step by step, over the railways and the petroleum trade alike that would defy public opinion. It would be interesting, as a psychological study, to know whether the conception from which the Standard project sprang included at first the crushing out of all rivalry, and the control of the markets, which it finally attained; \* or whether

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\* A story sometimes heard, in the under-currents of trade gossip, tells how the originator of this scheme presented himself at a meeting of bank directors in Cleveland, and demanded an advance of hundreds of thousands of dollars. Being asked what security he offered for so large a loan, he replied that his security was simply a monopoly of the petroleum trade, and presented such evidences of his ability to obtain that monopoly that the bank directors were convinced, and furnished him the sinews of war for his career of conquest. The story is not authenticated, and is, perhaps, a rather skilfully drawn bit of *ex-post-facto* fiction. But it is interesting as illustrating the recognition of the fact in business circles that the means adopted to give the Standard Oil Company success at the outset of its career were well calculated to insure it the final attainment of its subsequent monopoly.

it only sought the advantages immediately in view, and thence was led on from one point to another, for the maintenance and extension of its power. It is probable that the genius that inspired it saw at first only the prizes directly before it; but as Napoleon at the Bridge of Lodi foresaw his conquest of Europe, it is possible that this Napoleon of the petroleum trade felt in the opening of his career an ambition proportionately as inordinate as that of his prototype. No matter whether or not the end was seen from the beginning; the methods used were such as both achieved immediate gain and laid the foundations of the immense monopoly afterwards established, without exciting the public alarm.

No less interesting would be a full knowledge of the methods by which the railways were first bound to the Standard scheme. But no evidence attainable by the public exists on that point, and the matter must be left to conjecture. The ability to employ lake transportation on a large share of its shipments from Cleveland has been alleged as the first consideration by which the Standard obtained its vital advantages in rates. This is a sufficient explanation of lower rates at Cleveland than elsewhere, but does not afford any ground for the preference given to the Standard over its rivals at that point. The fact that, ever since then, the support given by the New York Central and Erie lines to the Standard's monopoly of the refining trade has been unwavering, while the Pennsylvania Railroad has at times in intervening years made vigorous efforts to throw off the yoke, may be taken as an evidence that the ties which connected the two former roads to the scheme were closer and



more firmly knit than those of the latter. It is possible that the Standard managers at the start relied on the universal rule of the railways to give the lowest rates at competitive points, to insure that the Pennsylvania Railroad would maintain their advantage at Cleveland over their Pittsburgh rivals. The main fact that is public property is, that by the summer of 1874 the railways were fully committed to the interest of the Standard. The majority of the refineries in Cleveland were either consolidated under the charter of the leading corporation or leased to it for a term of years. Near the opening of its career, too, the Standard obtained a controlling interest in the United Pipe-Lines Company, already the main transportation company for conveying oil in pipes from the wells to the railways, and which subsequently obtained absolute control of that business. The result of these combinations became manifest in 1874, affecting the relative positions of the rival refining interests in the market for exporting refined petroleum from the seaboard.

On October 1, 1874, the railways established the rate of \$1.90 per barrel to New York \* for all refineries, whether located in Pittsburgh, Cleveland, or the oil regions. This rate affords a marked illustration of the ingenuity with which railway rates can be made to oppress legitimate and independent industry. Apart from the question whether the same charge was really made to the Standard and other refineries, it utterly discarded the element of distance in the cost of service. The Pittsburgh refineries, which required a haul of 60 to 75 miles for the crude oil from the wells, and of 350

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\* New York Investigating Committee's Report, p. 42; testimony, p. 3417.

miles for their refined product from the refineries to the nearest point of export, were deprived of their legitimate advantage over the Standard refineries at Cleveland, which required a haul of about 250 miles farther. This was asserted to be for the avoidance of discrimination; but it was nothing but a defiance of the principle that like charges should be made for like service. It was equivalent to declaring that industries located where they can be carried on most economically shall be deprived of the legitimate benefit of the foresight which placed them there, and reduced to an equality with those improvidently built where they require extra and unnecessary transportation. It denied to the public the cheapness in its staples which comes of producing them where they can be most economically produced. In principle the railways might as well have claimed that it would be just to carry the crude oil from the Pennsylvania wells to a refinery in the Rocky Mountains, and thence back to the seaboard, at the same rate as to the Pennsylvania refineries. If the same rate had been charged to the Standard and to its Pittsburgh rivals it would have been a discrimination against the latter. But the fact soon became apparent that the Standard refineries obtained further advantages which enabled them to undersell their competitors in the export markets. The establishment of the new rate was a virtual prohibition upon exports from the Pittsburgh refineries, and they were confined to the supply of the interior trade, which absorbed a mere fraction of their previous product, until they could devise some means of relief. The plan for relief was found in the project to lay a pipe line from the oil regions to Pittsburgh. To understand this

project it must be stated that the rates were so levied that all crude oil brought to the Pittsburgh refineries by the Allegheny Valley Railroad must, when refined, be taken East over the Pennsylvania Railroad. That is to say, a single rate was charged as a whole from the oil regions to the seaboard; and the Pittsburgh refiner was required to pay the entire rate, even if he shipped his refined oil by another route. The object of this device was to prevent the Baltimore and Ohio's line to Pittsburgh from competing for the oil traffic. If an independent pipe line could be put into operation, the Pittsburgh refineries could receive their crude oil by that line, and the Baltimore and Ohio could compete for the transportation of the refined product. This would not only put the Pittsburgh refiners on an equal footing, but would give them an undoubted advantage. It was believed that the saving on the transportation of crude oil to the refineries would be two thirds of the prevailing rate; while the additional saving, by the shorter haul from Pittsburgh to the seaboard, would make that city the refining centre of the country instead of Cleveland. The project took shape in the Columbia Conduit Company, which began in that year to lay its pipes from the oil wells to the Pittsburgh refineries.

That the estimate of the high importance of this measure in sustaining competition was not confined to its supporters is demonstrated by the steps which the Standard and the railways took to defeat it. The laws of Pennsylvania at that time afforded them a means of opposition which they used to the utmost. These laws gave to pipe lines in the petroleum-producing counties the power to appropriate the right of way for their

pipes, just as the railways do under the eminent domain of the state. But this power was confined to the oil-producing regions, so that the right of way to Pittsburgh could only be obtained by purchase, without the aid of the state's eminent domain. No difficulty was experienced in obtaining the consent of property owners to bury pipes under their fields. The new line was laid without opposition until it reached the north bank of the Allegheny River, where, within sight of the Pittsburgh refineries, the Pennsylvania Railroad, which had a branch running along that river, forbade the laying of the pipes under its track. An appeal to the legislature, to extend the right to appropriate property by legal process, already granted to pipe lines in the producing counties, was the next step. This was met by the combined force of the Pennsylvania Railroad and a lobby which was notoriously at the service of the heaviest purse. To afford a fair excuse for the defeat of a measure which was required by the material interests of the state, it became necessary for the Standard to divide the Pittsburgh interests. A leading firm of that city, whose senior member had publicly avowed his support of the free pipe bill, was admitted to the Standard corporation, and he reversed his position and declared against the bill. This extension of the Standard interests to Pittsburgh was followed up by the purchase and lease of other establishments, until enough Pittsburgh refiners were induced to oppose the bill for equality in pipe-line transportation to afford a pretext for killing the bill.

But by this time the Columbia Conduit Company had devised a method of partly overcoming the obstacle. While the railroad could prevent the pipe line



from going under or over its tracks, it could not hinder the passage of wagons over its tracks upon the public road. So the pipe line was brought up to the track, within a few feet of the public-road crossing. On the other side of the track, only a few feet away, was the end of a pipe which connected with the Pittsburgh refineries. Oil tanks mounted on wheels were filled from the pipes on the north side of the railway, driven across the track by the public crossing, and discharged into the pipes on the south side, to be conveyed to the refineries a few miles away. For many months the wagons hauled their loads of oil over the West Pennsylvania tracks, to avoid the obstacle presented by the legal rights of that corporation. Finally—probably because the pipe method was really safer and less liable to accidents which might be expensive to the railway—the latter consented to allow the pipes to be laid under the tracks and the complete pipe-line connection to be made with Pittsburgh. Perhaps also the railway managers believed that, under new combinations soon to be formed, the value of the pipe line as an independent route would be nearly destroyed.

The interests of the Standard Oil Company now required it to attach the Baltimore and Ohio Railroad to the combination, instead of leaving it to maintain an independent route for the Pittsburgh refiners. The discriminations of the other trunk lines were maintained, so that no independent Pittsburgh refining firm could ship oil to the seaboard by the Pennsylvania Railroad at its regular rates, and sell it there in competition with the Standard, which continued to move petroleum in large volumes over that road at whatever the secret rates may have been. But though the Baltimore and



Ohio road, while used as a competing line by the independent refiners, had its economy materially impaired by expensive transfers between the refineries and the shipping-point, yet it enabled these refiners to enter the seaboard market on nearly equal terms with the Standard, and to keep up the fight for existence with a fair degree of success. The policy by which the Pittsburgh refineries were forced into decay is illustrated by the fact that previous to 1874, and at periods in 1875 and 1877, whenever they enjoyed any approximation to open competition among the railways for their freights, their business was active and expanding.

To prevent the independent refiners of Pittsburgh from maintaining their trade against the combined power of the Standard and the three other trunk lines, the alliance of the Baltimore and Ohio Railroad became necessary. The termination of a railway freight war which had been waged for some time between the trunk lines, in a general treaty, afforded an opportunity to attach the Baltimore and Ohio Railroad to the combination. Heretofore this road had been, in the oil trade, a competitor, and a supporter of independent competition. Thereafter it assumed the character of a weathercock, at one time throwing its power on the side of the Standard, and at another breaking away, because its share of the spoils was not large enough. In this case it was reported that a concession to it of a percentage in the live-stock traffic from Chicago, and of a differential rate on grain to Baltimore, less by four cents than to New York, formed the consideration for which it agreed to desert the Pittsburgh refiners and join the other trunk lines. The ties of the other three companies to the Standard were by this time so strong

that they were ready to make large concessions on other questions to secure the dominion of their darling monopoly. The compact was made, and the rate on petroleum from the pipe lines to the seaboard, over whatever distance the shipments were carried, was fixed at \$1.15. Apart from the persistent injustice already referred to, of ignoring the element of distance in the charges, this rate could be endured in the transportation of petroleum. Although deprived of their advantage in location, the independent refiners could have kept up their competition if the rate had been charged equally to all refiners. It was alleged at the time that this rate was charged on the Standard shipments; but nobody believed this, and nobody was expected to. For, within a few weeks of the promulgation of this rate, the Standard was selling oil in the Eastern markets at less than the first cost at the refineries, with the open freight rate added. The discrimination was known to be large in amount, but its exact character was not known. It has since then been explained by the discovery of the New York Investigating Committee \* that, on August 1, 1875, the New York Central and Erie railroads contracted to give the Standard a rate as low as the lowest net rate to other parties, and, besides, to pay the Standard and its affiliated companies a rebate of ten per cent. on all shipments of oil. The "affiliated companies" were those which the Standard had admitted to its combination as a reward for their aid in defeating legislation in behalf of free competition; and the correspondence of the Standard and the Pennsylvania Railroad in 1877 showed that the ten per cent. rebate on all shipments

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\* New York Investigation, Exhibits, pp. 175, 192.

of oil included not only a special lowering of the Standard's rate, but a tax on all the oil which their rivals might ship. By such means as this the independent refiners were again shut out of the market. Even in supplying the domestic trade, it was found that the Standard could get small shipments to interior jobbers more cheaply than the independent refiners. The trade of the latter was nearly destroyed; some refineries were closed and one or two became bankrupt.

But the refiners found a method of prolonging the contest one year more. They still had the Columbia Conduit to supply them with crude oil, and they adopted the plan of shipping their product down the Ohio River to Huntington, West Virginia, whence it was taken by the Chesapeake and Ohio Railroad to Richmond for exportation. By this roundabout line many thousands of barrels were shipped during 1875 and 1876. The exorbitant character of the trunk-line charges is evident from the fact that a rate of 80 cents a barrel for nearly 500 miles of additional transportation, with an extra transfer at considerable expense, was remunerative to the Chesapeake and Ohio Railroad. But even at that rate the Pittsburgh refineries were at a disadvantage. The circuitous route was more expensive at the best than the direct and rapid one closed to all but the Standard. The river half of it was dangerous and useless for six months in the year, from low water in the summer or ice in the winter; and when the long and slow journey had been performed, the product reached, not a great exporting city, but a port just coming into use, where no market for exportation was established, and where the means of shipment abroad were indirect and uncertain. It was evident that the

struggle was a losing one for the independent refiners, while the Standard continued to extend its power and wealth. It had laid a pipe line of its own from the oil regions to Pittsburgh, meeting with none of the obstacles from the railways that had been thrown in the way of the Columbia Conduit Company. It had extended its refining establishments by buying out or admitting to partnership a number of refining firms in New York, Philadelphia, Baltimore, and West Virginia, so that at every important refining point the Standard had a foothold, and secured to its branches advantages which no outside refineries could have. Its sharpest fight, however, was with the body of ten or twelve firms in Pittsburgh, who kept their independence for about four years, until the event, famous at that day as "the Potts fight," at first revived their hopes, but after a few months of bright prospects sealed their doom, and the struggle for commercial freedom ended in an ignominious surrender to the Standard.

In the early part of 1877 the Pennsylvania Railroad began to show some discontent under the restrictions which it had imposed upon itself in behalf of the Standard. But the Standard had grown from the position of a bantling, dependent for its prosperity upon railroad favors, to that of a tyrant which dictated terms to the trunk lines, and administered punishment to disobedient railways, by throwing all its traffic on the lines which remained faithful to its interests. Having, as it deemed, the Pittsburgh refining interest under its feet, it asserted its power over the railways, and its monopoly of the refining interests in the Eastern cities, by ordering the Pennsylvania Railroad to refuse the carrying business of the Potts combination.



This was an association of Eastern refineries, second in magnitude only to the Standard, and rumored to be second also in the discriminations which it obtained from the railways. Besides its refineries in the East, this combination, through the Empire Transportation Company, a subsidiary corporation of the Pennsylvania Railroad, controlled a pipe line and considerable producing territory in the oil district. With these facilities, and with a low rate on the transportation of crude petroleum from their pipe-lines to their works, the Potts refineries enjoyed a prosperous and expanding business until the Standard determined that the time had come to strike a blow at this rival. The arrogant demand that the Pennsylvania Railroad should turn away the freight of the Potts refineries from its depots, and close out its interest in the favored corporation which it was maintaining, was met by a refusal from the Pennsylvania Railroad managers, who happened to be in fighting mood, and a freight war, the bitterest that had yet been known, was precipitated upon that corporation. The railway declared that it would make rates for all independent refineries equal to those given to the Standard. The Standard responded by turning all its shipments on other lines, leaving the Pennsylvania Railroad to depend on the crippled Pittsburgh refiners who had nearly lost their trade, and on the Potts combination, for its oil traffic. If the fight had continued on that line the independent interests might have grown so as to compensate the railway for its loss of the Standard's business; for as soon as they had a chance to compete in the foreign markets they experienced a rapid revival. But other influences were speedily introduced into the



contest. The Pennsylvania Railroad was taught to feel the power of the corporation for whose increase and wealth it was more responsible than any other one agency.

The New York Central and Erie roads showed their fidelity to the cause of the Standard\* by supporting its demand and attacking the Pennsylvania Railroad in a bitter war of rates, which reduced its revenues at all points. The opposing capitalists controlled the money market so as seriously to hamper the finances of the insubordinate railroad, already crippled by other adverse influences. The great Pennsylvania Railroad found that its creature, the Frankenstein which owed existence and growth to it, was now its master and conqueror. The humiliating fact was acknowledged by a surrender, and the rebellious corporation passed again under the yoke of the Standard, in the closing months of 1877. The railway protected the interests of its protégés to the best of its ability. The Standard purchased the refineries of the latter in the East, and their oil-carrying cars, pipe lines, and producing territory, concluded an apportionment scheme by which it guaranteed to the Pennsylvania Railroad a fixed share of the petroleum freight traffic, and entered on its final and absolute monopoly of the oil-refining trade. For

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\* "The Central and Erie railroads joined hands with the Standard and proceeded to enforce its demand by a war of rates, which terminated successfully in October of that year. The oil traffic, instead of being more profitable to the Central and Erie, has certainly been less remunerative since that war than before. We are unable to find the slightest respect wherein it resulted to the advantage of these roads. The Standard got the 'plum,' and as a result it owns exclusively the terminal facilities for handling oil in Philadelphia and Baltimore. It owns and controls the terminal facilities for handling oil of the four trunk-roads."—*New York Investigating Committee's Report*, p. 44.

its victory over the Pennsylvania was not the only step by which it strengthened its dominion at this time. The Baltimore and Ohio had again given the Pittsburgh refiners, who received their supplies from the Columbia Conduit Company, a chance to ship their product over its road. This would have preserved the life of the independent refining interest, and could not be suffered by the monopoly. The trunk-line influence induced that road to notify the Columbia Conduit Company that no more oil transported by its line would be received on the Baltimore and Ohio. At the same time, a proposition was made to that company for a purchase of its pipe line. As the choice was between sale and extinction, the proposition was accepted, the pipe line passed into the hands of the Standard and was torn up, leaving, as the only pipe line running to Pittsburgh, the one connected with the Standard refineries.

This made the monopoly absolute master of the refining trade. It controlled every avenue of transportation, managed all the largest refineries in the land, and was able to shut off every competitor from either receiving supplies or shipping its product. If any refineries in any part of the land were permitted to run they owed their immunity to their insignificance. The Pittsburgh refiners, who had struggled for four years against the domination of the Standard, were left without any avenue of escape, and the rigor of their fate can be perceived from the fact that at the beginning of 1878 nearly every firm of the original refining interests of Pittsburgh had either made the best terms practicable with the Standard or accepted the alternative of the bankrupt courts. From its original com-

monoplace proportions, the Standard had, at this time, swelled to a corporation whose wealth was estimated to exceed \$30,000,000. The sources from which most of this wealth was drawn may be understood from the disclosures afterwards made of the discriminations in its favor. Up to that time these favors could only be inferred from the fact that the Standard could ship oil over the trunk lines when none of its competitors could do so at prevailing rates. The first legal avowal of its rates was in the case of *H. L. Taylor et al. vs. The Standard Oil Company*, in which it was alleged by the plaintiff that a rebate of \$1 per barrel had been paid by the railways to the Standard. The reply of the Standard admitted a payment of a rebate, but denied that it was of the amount named. Subsequently Mr. A. J. Cassatt, of the Pennsylvania Railroad, testified before the New York Legislative Investigating Committee that in eighteen months the railways had paid to the Standard the sum of \$10,000,000 in rebates. The period covered by the testimony was a year or two later than the time now under consideration. But the inference is plain that the rebates paid the Standard during the period of its growth from an ordinary corporation to a complete monopoly were equal to its entire increase of wealth for that time. In other words, its entire profits were comprised within the discriminations made in its favor by the railways.

The compact by which the railways surrendered themselves and the public interests to the rule of the Standard was well understood to be vital and binding; but of its exact and shameful details the public was kept in ignorance until two years later, when the

correspondence, comprising the contract, was brought out by legislative investigation. In this contract the Standard assumed the power of parcelling out the traffic, not only between the different trunk lines, but between the different cities. Of the shipments to the seaboard sixty-three per cent. should go to New York, of which the New York Central, Pennsylvania Railroad, and Erie were each to carry one third; of the remaining thirty-seven per cent. the Pennsylvania Railroad was to be given twenty-six shares, and the Baltimore and Ohio eleven. For guaranteeing this division of the traffic the Standard received a "commission" (as it was called in this document) of not less than ten per cent. of the rate. This commission was stipulated to be subject to indefinite increase, but under no circumstances to reduction. It was also reinforced by the important provision that no other shipper of oil should have any commission or rebate whatever, unless his shipments were as large as those of the Standard.\* As the railways had already raised the Standard to the position of controlling over ninety-five per cent. of the trade, and had crushed out nearly all its rivals, it will be seen that the probability of finding such a shipper to enjoy equal terms with the monopoly was very remote. Nor, with the Standard in control of the trade, was it likely to have any difficulty in carrying out its guarantee of the percentages which it had parcelled out among the railways. The compact was a league and covenant between the railways and the Standard, that no independent competition in the petroleum trade should be permitted by the rail-

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\* Correspondence of Wm. Rockafeller and Thos. A. Scott, Oct. 17, 1877.



ways. It bound the corporations to the principle that competition was to be abolished, and handed over the producers and consumers alike to the tender mercies of the monopoly which was established by the power of the railways. It might be supposed that such a complete surrender to its power would satisfy the ambition of the Standard. But it appears that there was one more point which it desired to gain. On February 15, 1878, the American Transfer Company, controlling the crude shipments of the Standard combination, asked from the Pennsylvania Railroad the extraordinary commission of 20 cents a barrel on all crude oil transported by the railroad for shippers not members of the combination. Some of the producers had been shipping crude petroleum, enduring the ten per cent. discrimination, and to stop such an independent course, the commission of 20 cents per barrel was asked of the Pennsylvania Railroad for every barrel of oil it transported, whether shipped by the Standard combination or by independent producers. It would seem almost incredible that any shipper could ask for a payment on his rival's business, but the letter making the demand is extant, and so is the still more astounding letter of the third Vice-President of the Pennsylvania Railroad to the Comptroller of that company, stating that he has seen the documents; and that the New York Central and Erie roads were allowing such "rebates" of from 20 to 35 cents; and ordering the comptroller to make out vouchers for the rebate of 20 cents to the American Transfer Company on the entire crude petroleum business of the Pennsylvania Railroad.\*

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\* Correspondence of Daniel O'Day and A. J. Cassatt, Feb. 15 and May 15, 1878.



A review of the position of the Standard Oil Company at this time showed that it had little more to desire in the extension of its empire over the oil refining interest of the United States. It controlled, in Cleveland, Pittsburgh, Baltimore, Philadelphia, New York, and Boston, works comprising ninety-five per cent. of the refining capacity of the United States, all the pipe lines within the oil regions, and about one sixth of the producing territory. It wielded an absolute and unchecked control over every department of the petroleum trade. It could dictate every step taken by the railways, impose terms on any outside dealer in crude or refined petroleum, and, if there was any disobedience, could administer effective discipline to the recusant, whether a railway corporation or a merchant. The few outside refiners who managed to keep their works in intermittent operation were forced to receive their crude oil by rail, while the Standard refineries were supplied directly by pipe lines, with an economy of  $67\frac{1}{2}$  cents per barrel. By its position as the only purchaser of crude petroleum, and its control of pipe-line certificates, it could raise or depress the markets at its will; it could crush out any attempt to revive competition; it had bound to its service the four great trunk lines; and in the defence of its interests up to and after this time, its practically unlimited corruption fund secured to its allegiance the legislatures of the three greatest states of the Union. From this time, the career of the Standard consisted in maintaining the absolute character of its rule, extorting the full profits to be secured by its monopoly, and punishing all who rebelled against it.

It was not long after the final establishment of the

monopoly before feeble attempts were made to overthrow it. The Baltimore and Ohio Railroad had hardly allowed the pipes of the Columbia Conduit Company to be taken out of the ground, before it discovered that the mess of pottage for which it had sold its birthright of free competition was small and worthless. It would have resumed competition, but its connection by the Columbia Conduit Company with the oil region was gone. An attempt was made to bring a new pipe line to Pittsburgh, which produced another movement for a free pipe law. The oil regions united with a few refiners in asking for that measure; but in vain. Even the attempts to hold a public meeting in favor of the new bill were smothered by the Standard. To prevent the expression of independent public opinion, a meeting called for that purpose, in Pittsburgh, was packed by the workmen of the Standard refineries, who howled down every speaker advocating commercial freedom in the oil trade. Paid articles in the press asserted that the measure would take the refining trade from Pittsburgh and carry the whole business to other states. As this was just what the Standard was doing—the oil business at Pittsburgh having, at that time, diminished fifty per cent.—only those who wished to earn the Standard's wages were affected by such a plea. But that class, especially among the law-makers of Pennsylvania, was numerous enough to secure the defeat of the free pipe bill. That measure was again voted down, and the attempts to secure an independent line of transportation were abandoned.

The seaboard pipe line was another project which assumed more threatening proportions. This scheme aimed at carrying petroleum in pipes direct from the

wells to the seacoast. It could not reach the seaboard with the pipe-line law of Pennsylvania as it then was; but in June, 1879, the opposition company succeeded in getting its pipes through to a railway which was not in the Standard combination. By this means it established a partial competition with one branch of the Standard. The railways rallied their united powers this time to protect their monopoly and master "against injury by competition." A meeting of the railway and Standard officials on June 5 reduced the open rate on crude petroleum, first to 80 and then to 30 cents, while the Standard at once obtained the special rate, for its own private use, of 20 cents per barrel. Upon this very low cost of transportation it made a profit on about two millions of barrels of oil, which it had previously contracted to deliver. The continuance of such a rate, while the seaboard line kept up its fight, allows but one of two conclusions. Either the rate of \$1.15 to \$1.90 per barrel, which the railways had charged to the general trade, was extortionate, or the rate of 20 cents, which they gave to the Standard, was throwing away their stockholders' money for the benefit of the monopoly. Which horn of the dilemma may be chosen makes no difference. The important fact is that during that year the railways kept up the fight to destroy competition, until the stockholders of the seaboard pipe-line were forced into quietly selling their interests to the Standard, and the monopoly was again triumphant.

In the meantime the Standard Oil Company extended its pipe lines to its refineries in Cleveland and in eastern cities; and it is noticeable that while the railways always placed insuperable obstacles in the

way of independent lines, the monopoly could lay its pipes wherever it desired. It controlled the jobbing trade, and rendered it almost impossible for any outside refiner to sell his product even to domestic dealers. Its tyranny was felt by the dealers in oil throughout the country. It maintained an organization which watched the entire trade, and if any wholesale dealer or jobber undertook to sell the product of independent refiners, or to sell for less than its prescribed prices, he was cut off from further supplies, and every means that unscrupulous wealth could employ was used to injure his commercial standing. Even at such a distant point as Columbus, Mississippi, when the grocers claimed the right to sell independent petroleum that had reached them by the river route, the monopoly established a grocery store and sold goods below cost in order to drive the merchants into submission. In this case, happily, the monopoly was defeated, as the merchants unitedly refused to buy the oil of the Standard Company until it retracted its claim of dictation, and, perhaps because of the smallness of their trade and their location, they were successful. A coal merchant in Ohio, who had some spare storage room, bought an invoice of lubricating oil from an independent refinery, and as soon as the regulators of the Standard learned of his transgression they purchased coal, and ordered their agents to sell it at less than cost, until he was forced to succumb. In every city in which the retail petroleum dealers have disobeyed the Standard's behest—and even in some others—the monopoly has put tank wagons in operation, which traverse the streets, and sell petroleum at retail to private consumers. In Baltimore the rebellious merchants were punished by



the sale of petroleum at retail, from these wagons, at a price lower than that which the Standard charged to jobbers; but the difference was made up by raising the price to the people after the local merchants had been driven out of the trade. In short, for the seven years since the establishment of its absolute empire, the Standard Company, as a journalist puts it, has "bullied the trade of the country, wholesale and retail alike." With its power to control the retail trade, at one time checking shipments and glutting the market with crude oil, at another taking exactly the opposite course, accompanied by its almost unlimited resources for manipulating the speculative exchanges, and by the constant rebates through which it monopolizes the export trade, the accumulation of wealth by the Standard has been unchecked. Its resources, which in 1873 were \$1,000,000, and in 1878 had grown to \$30,000,000, are now rated at the enormous sum of \$100,000,000; and as the capital stock of the Standard Trust Company and the American Transfer Company at par amount to nearly that sum, the estimate is probably not excessive.

It has been claimed that this vast aggregation of wealth has been created by superior business ability. One writer says: "In one sense the Standard is entitled to all it has. Its energy, foresight, sharpness, and calculating precision of probabilities and possibilities, have brought it, with exceptional luck, its vast accumulation of wealth and power and property." This is an erroneous view.\* It is true that the Standard

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\*"That these gentlemen possess eminent business talent is obvious; but that they possess a monopoly of the business ability of the country commensurate with their monopoly of the oil trade is eminently absurd."—*New York Investigating Committee's Report*, p. 44.



has been managed with ability. The greatest foresight and audacity were required to conceive the monopoly, and to obtain from the railways the favors which established it. If a highway robber should gain vast plunder by bribing the railways and the courts to let him rob trains with impunity, his remarkable boldness of conception and soundness of judgment in selecting his tools would be acknowledged. But he would owe his wealth not to his ability, but to nefarious corruption and violation of duty on the part of those whose business it is to protect the public. In like manner the ability and energy of the managers of the Standard Oil Company would never have given them more than local importance, if they had not been favored by the railways with rebates and privileges that enabled them to crush competition. Nor could that monopoly have been maintained without the corruption of legislators and the bribery of public officers.

The country has been startled during the last year by the exposure of some of the methods used by this great corporation to crush out its latest rivals. In a suit of a Buffalo company against one of the Standard corporations\* it was proved that the defendants had enticed away the manager of the plaintiff's works, by threats and bribery; that they had secured the delivery of adulterated oil to the plaintiffs, and had brought vexatious suits against them. Testimony was offered that the agents who enticed away the manager of the independent concern had tried to get him to leave the works in such a condition that they might be blown

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\* Buffalo Lubricating Oil Company *vs.* Vacuum Oil Company of Rochester. In this case the plaintiffs secured a verdict of \$20,000 damages for conspiracy.

up and destroyed, but this was excluded by the court. In another case, recently exposed in Cleveland, an officer of the Standard Oil Company tried to bribe the bookkeeper of an independent firm to betray the particulars of its business and the names of its customers. These disclosures drew from the press expressions of surprise and condemnation. It is hard to see why they should excite surprise. Such acts are the necessary and natural accompaniments of the policy which created the monopoly, and if they are dishonest and oppressive, it is because that whole policy is one of dishonesty and oppression. If unscrupulous men have succeeded in inducing great railway corporations to give them unjust advantages to the ruin of their rivals, and have thus built up wealth to the extent of a hundred millions, are they likely to shrink from corrupting the manager of an independent establishment to desert his employers? When they have induced legislators to defeat laws securing to all competitors equality in transportation, will they hesitate to bribe, if possible, an obscure bookkeeper to disclose the secrets of his employers? The crushing out of a single rival is bad enough; but it has not the public significance that accompanies the reduction of an entire industry to such ruins as can be seen for miles along the banks of the Allegheny River in the suburbs of Pittsburgh. These conspiracies are but illustrations of the corruption and unscrupulousness which marked the rise of the Standard Oil Company between 1874 and 1879.

With what forces the monopoly of the Standard is still upheld, was disclosed by two public events in Ohio during the past year. A number of independent refineries at Cleveland have lately attempted to com-

pete with the Standard. It was essential to have a pipe line from the Pennsylvania oil fields to their works. They petitioned the Ohio legislature for a law authorizing it, setting forth that they were obliged to pay 30 cents a barrel to the Pennsylvania Company for transporting crude oil from the oil regions to their works; that the Lake Shore and New York, Pennsylvania, and Ohio roads refused to carry crude oil at all, since the Standard Company had laid down its double line of pipes; that the latter company, with two pipes, refused to transport petroleum for them at any price, while carrying for its own refineries some 5,000,000 barrels a year; that with a common-carrier line, such as they were endeavoring to establish, the independent refiners could bring their crude supplies at a cost of 10 cents per barrel, as against 30 cents charged by the only line which would transport their oil; and if they could obtain such a line they could refine 600,000 barrels of oil the first year and twice as much the next. On such a state of facts what could the representatives of the people do, but at once place the competing refineries on an equality with the Standard? But, in the same legislature which sent a representative of that great corporation to the United States Senate, the measure was quietly defeated, after such work by the lobby that members of the body and some of the Ohio press characterized it as "an indelible disgrace to the state."

The discrimination against the independent refiners on another branch of their business was shown beyond dispute in the suit of Scofield, Schurmer, & Teagle against the Lake Shore road, which was tried in the Cleveland courts last year. These independent refiners asked for equal rates with the Standard over

that railway to Western cities. Failing to obtain these rates, they brought suit against the Lake Shore Company for damages. The testimony of the officers of the railway in this suit establishes the fact of discrimination. The president and general manager testified that his road, ever since his connection with it, had given better rates to the Standard than to other refineries. The general freight agent's testimony showed the character of that discrimination, in the fact that the Standard had at one time enjoyed a rate to Chicago of 35 cents per barrel and 28 cents in tank cars, while the tariff rate was 80 cents per barrel. This was an extreme case, the average discrimination being a little more than 20 cents per barrel, on shipments to Chicago, and to other cities in proportion. The advantage of the Standard in its pipe-line transportation is equivalent to about 30 cents per barrel on refined oil, so that the total discrimination in its favor amounts to 50 cents per barrel. Upon its average shipments of 600,000 barrels per year over the Lake Shore, therefore, the Standard has a margin of profit of \$300,000 annually, enabling it, on this branch of its business, to defy competition.

It should be said that within a year there have been indications that efforts to establish independent refining interests are not utterly hopeless. Two years ago, after the right to run pipe lines over the state, freely exercised by the Standard, had been for nine years denied to other oil interests, an exceptionally independent legislature of Pennsylvania passed a free pipe bill. This enables crude petroleum to be carried to independent refineries, if enough of it is wanted to support such a line. One or two independent refineries have been started at Pittsburgh. A new pipe line has



been laid from the Pittsburgh refineries to the nearest districts of the oil fields, notwithstanding the opposition of the railways and the Standard. The effect of competition upon the producing interests is shown by the fact that wherever this new line has reached the wells, the Standard has instructed its agents to pay an advance of 10 to 12½ cents per barrel above the market quotations, for crude oil delivered to its pipe lines. This attempt to break down competition is likely to defeat itself, as it shows the producers what they have lost through the absence of competition, and induces them to sustain the project which, at its very start, secures an advance on their product equal to \$4,000,000 on their entire stock. The independent refineries of Cleveland, twelve or more in number, have the lakes open to them for eight months of the year. With a discrimination of 20 cents a barrel against them on their crude supplies, they have proved that they can at least maintain their existence; and they hope, if they obtain the power to build a pipe-line to their works, to secure an important and rapid expansion of their business. But the work which has been done by the railways during the past ten years, in building up the monopoly, will make competition a difficult task. An independent pipe-line must compete with the Standard pipe-lines and their capital of \$25,000,000, having branches at every well in the producing regions, and controlling tanks and delivery stations at every point in the trade. The independent refiners must measure their strength against the Standard Company with its capital of \$70,000,000, present in every market of the world, controlling every avenue and branch of the trade, descending even to the sale by the half-gallon to



consumers from its tank wagons, at less than cost, wherever its rivals are able to put their products in the market. As surely as justice and commercial as well as political freedom must finally prevail, the struggle for freedom in this trade will some day be triumphant; but the exertions of the railways to establish and maintain the monopoly make the odds fearful, for the time, against freedom and independence.

Pleas are never wanting to justify monopoly, and those advanced on behalf of the Standard require some consideration. They have an especial interest in connection with the subject of railway discriminations and railway pools, as they exhibit in an extreme form the principles on which these practices are defended. It is claimed on behalf of the Standard Company, first, that by apportioning freights among the railways engaged in carrying petroleum, it enabled them to maintain profitable rates, and that by guaranteeing and enforcing that apportionment, it was of actual service to the railways; second, that the combination of refining interests out of which the Standard monopoly grew, simply secured, by union, profits which they could not have secured in competition. It was argued that as the great bulk of the petroleum product of this country was destined for exportation, the devices which increased the cost of the staple at the seaboard did no harm to the producers. On behalf of the railways it is urged that the influence of the Standard in sustaining rates justified the discriminations in its favor; and the case is presented as an instance of the principle that railway managers will give the best rates to the largest shippers. Prominent railway men have declared that as the Standard could give them larger

shipments than any other refiner, they could give better rates to it than to its competitors. These arguments connect themselves with the whole subject of pooling and discrimination, the thorough discussion of which must be reserved for subsequent chapters; but some of the principles applicable to this case call for notice here.

Waiving for the present the inconsistency of the position of the Standard, as at once the great upholder of railway rates and the recipient of lower rates than any other refiner ever obtained, the claim that its influence on prices has not injured the producers of oil must be emphatically denied. Since the Standard Company acquired its power the producing interests of the oil region have been in a condition of chronic depression. The cost of crude petroleum has been kept at a low average, while the charges for refining and transportation, imposed by the power of the Standard, have forbidden a corresponding reduction of the price abroad, and thus prevented the increased demand which, in a normal condition of trade, would compensate for low prices. The phenomenal position of the controlling power in that industry has been such that it was enabled practically to say to the producers: "You must expend the labor necessary to bring the oil to the surface. Except as regards the portion of the territory which we own, we will make no outlay and take none of the risks in production; but when the oil is produced, by our control of the avenues of transportation, we will take exclusive charge of it, fix the price for which we will buy it, and appropriate the lion's share of the receipts from the oil when it is refined and taken to market. If you do

not like our terms you can let the oil run to waste or leave it undisturbed in its subterranean reservoirs." The recent action of the Standard, in offering an advance of 10 to 12½ cents per barrel on the market price of oil wherever the competing line has reached the wells, shows that the loss to the producers, through the lack of competition in transportation, for the last eight years, must be reckoned by millions. Consider the present situation of the petroleum market with a surplus stock of crude oil equal to more than a year's consumption, which, for about two years, has depressed the price below the average cost of production; while, on the other hand, the price in Europe has attracted the competition of the Russian oil fields to a degree that threatens to drive American petroleum out of Europe and confine its market to this hemisphere; is not the burden of the Standard felt by the producers? In the depressed condition of the crude petroleum business, which has prevailed under the Standard régime, it is clear that the extra charges for refining and transportation have been assessed in great part upon the producers, to say nothing of their present load of 30,000,000 barrels in surplus stock, which might have been marketed if the trade had been free from this monopoly. The essential fact is that the influence of the Standard has made oil cheaper to the producers and dearer to the consumers; and both differences have gone mainly into its own pockets.

The illusory character of the railway policy of maintaining high rates by reducing them to a favored shipper was never more clearly exposed than in this case. The theory was that by giving the Standard an advantage on a part of the petroleum, the rates on the bulk

of that business could be sustained; but the actual effect was, that the discrimination in favor of the Standard excluded all other shipments, and put the reduction into effect on the entire freight business of the petroleum trade. This result of the railway officials' method of sustaining rates suggests the question whether the conduct of the railway business of the country does not illustrate the Irish bull on a gigantic practical scale. It is worth while to remember, too, that the claim of the independent petroleum interests was not for low rates, but for equal ones. Although the old rates were shown by subsequent events to be excessive, the independent refiners could have paid them and maintained their existence if no one else had obtained lower ones; nor could the Standard ever have created its monopoly, except by the differential rates which enabled it to shut every one else out of the market. The arraignment of the railway combination, with the Standard as its binding power, is not an attack upon remunerative railway rates; it is an attack upon low rates exceptionally made in favor of a single shipper.

An error no less serious is exposed by this case in the favorite argument of the railway managers that it is for the interest of their corporations to give better freight rates to large shippers than to smaller firms. The practical mockery of this theory which builds up the business of favored shippers to immense proportions by preferential rates, and then tells those who ask for equal rates that their business is less important than that of their favored rivals, was never more unblushingly exhibited than in the case of the Standard. The question is not, as it is generally put,



whether it is better to get a shipment of a hundred cars from one firm than one of ten cars from another. It is whether it is better to get a shipment of a hundred cars from a single firm than shipments of a hundred cars from ten smaller ones. If the Standard had not been raised to its present tyrannical power there would have been in its place an independent interest of fifty or a hundred firms shipping, in the aggregate, as great or a greater amount of freight. Aside from the public aspect of the question, there is no doubt that it would have been better for the railways to carry the natural shipments of such a legitimate business than to depend upon the dictates and favors of a monopoly. It has often been shown, and notably in the report of the Hepburn Committee to the New York Legislature, that in endowing the Standard with railway favors out of which it has made a hundred millions of dollars in ten years, the policy of the railway managers was practically no less a betrayal of the interests of their shareholders than it was an assault on public right and justice.

I must acknowledge that the argument which places the combination in the light of one for the benefit of the refining interests has more foundation, in the assured fact that it has been exceedingly beneficial to the members of the refining interests which formed that corporation. It is true, too, that several firms, after they had been brought nearly or quite to insolvency by the pressure of the monopoly, were able to make terms that restored their fallen fortunes. To these, as well as to the partners in the corporation, the Standard brought greater or less prosperity. But to the other members of the refining interests of 1874, who



were driven into a sale of their works at a sacrifice, or found their business career terminated by the still less satisfactory sale of their property in bankruptcy, the benefits of the Standard's control of the refining interest are not so apparent. Suppose that a monopoly had been created by the organization of the entire oil trade in a single combination, with equitably distributed shares to each member. That might have resulted in greater profits to them all for a time. Such a combination, if it were possible in an independently organized industry—which, happily, it is not—would work no injustice to its members. It would require attention from the public point of view, and, if armed with the power to crush all fresh competition, would contain a threat to the public interests. But the prevalent fashion of pools and combination is not directly concerned in this case. The Standard was not even an equitably organized trade-pool. It was a combination of a part of an interest which said to some of the members of the business: "Come under our rules; conduct your business exactly as we direct you; run your refineries when we tell you to run; buy and sell only by our orders. If you obey our commands in all respects, and consent to our absorbing the bulk of the immense profits which our combination secures, we will guarantee you a moderate prosperity. Refuse and you shall be ruined." To the rest of the trade it said, by its actions, that they should be ruined in any event, and by the help of the railways it made good its threats. An increase of wealth to the amount of \$70,000,000 or \$80,000,000 in ten years is, probably, more than the old interests would have secured if they had retained their separate existence. But when

this wealth is divided up by giving \$25,000,000 to one firm, \$250,000 to another, and awarding utter extinction to a third, it may be doubted whether the trade, as a whole, is sufficiently repaid for the surrender of independence and uprightness. Business which is conducted on the basis of trying to give consumers the most for their money is a public benefit. That which is managed so as to increase the cost of the products to the consumers and to extort the greatest profit from them is a public curse. It would have been better for the refiners of this country to retain their position of doing a public service for all the money they got, than to expose their trade to the charge of extorting immense profits by fraud and force. But when the profit that was obtained by the favoritism of the railways is distributed in the form of immense wealth to one portion of the trade, moderate pay to another portion for conforming to the demands of the combination, and poverty to those who retained their independence, the claim that the Standard combination was for the benefit of the refining interests appears to be audacious if it is not sarcastic.

The complete answer to all such arguments in favor of railway pools, discriminations, and trade combinations, is given by the facts in the history of the Standard Oil Company. By whatever plea of expediency it may be supported, a policy is false which establishes a monopoly on the ruins of independent and legitimate competition. However splendid pecuniary prizes may be, they are a public wrong when they are made rewards for subservience or amassed by conspiracy and dishonesty. These are the results of the combinations which gave the Standard its remarkable increase of

wealth. Gloss over the methods used by whatever specious arguments the railway advocates please, they built up a great monopoly and crushed out an independent trade. They were conceived in favoritism and dishonesty, brought forth with the aid of corruption and conspiracy, and in full growth and maturity are a curse to the independence and integrity of the nation. If the Western bandits whose career has been so sensational had been able to amass as great wealth as the Standard, by highway robbery, their riches would not have demoralized the public more than the success of this corporation. They would, at least, have secured their gains at the risk of their lives. But the wealth of the Standard represents no such courageous dishonesty. It represents the reward which can be obtained by securing the favor of the railways to crush out open and honest competition; by bribing legislators to prevent equitable laws; and by employing all the powers of corruption and intimidation which immense hoards of money possess, to maintain arbitrary power and illegal monopoly. Apart from the encouragement it gives to similar attacks upon the independence of other industries, the success of greedy and unscrupulous wealth cannot fail to be demoralizing in all its influence. When gigantic dishonesty meets with such gigantic success, what wonder is it that more ordinary forms of the same evil prevail? In all its direct and indirect results, as the wrecker and destroyer of legitimately obtained prosperity, as a monopoly of an essential industry, and as a corrupter of public and business morals, the Standard Oil Company is an unmitigated evil and a public curse.

The infliction of that curse upon the nation must

be charged to the policy which unites the railways in efforts to suppress competition among themselves, and to give favored shippers a monopoly of the traffic by discriminating rates. For reducing a thriving and independent industry to ruins under the feet of the Standard Oil Company; for giving that monopoly the power, not only to dominate the petroleum trade, but to intimidate and conquer the very railways which had built it up; and for lifting it to a position in which it has been reputed to control at least one state legislature, two seats in the United States Senate, and a cabinet officer in the national administration—for all this the four trunk lines are responsible. If the New York Central and Erie railroads had maintained justice in their rates, the present tyrant of the petroleum trade could never have exceeded its original position as a merely local corporation. If the Pennsylvania Railroad had given the refiners along its line the same opportunity for cheap transportation that it gave the Standard, the independent industry of Pittsburgh would to-day hold the Standard in check by its competition. If the Baltimore and Ohio Railroad had kept up its character as a competing route, the same industry could have continued its struggle against monopoly on equal terms. It took the united action of all four trunk lines to force the petroleum industries of New York, Boston, Philadelphia, and Pittsburgh into complete subjection to the rule of the Standard combination. These four corporations, the exemplars and leaders of the railway system of the country, furnished to that conspiracy against independent commerce and free competition the active strength and support which made its success possible. Without their

steady and persistent violation of the great rule of equal privileges to all shippers, the project for the subjugation of the petroleum trade would have died still-born. In assigning to them the responsibility for such an attack upon commercial liberties, is it too severe to declare that the four leading railways of the country are guilty of the great commercial crime of the last decade?



## CHAPTER IV.

### THE LAW AND THE RAILWAYS.

A PUBLIC wrong may be made to bear the semblance of a private right. Thus railway discriminations are defended by claiming for the railways the same right that any citizen has, to perform service for one customer cheaper than for another. A merchant is at liberty to sell to A at a lower price than to B; he will sell to the buyer of \$20,000 worth at a lower price than to the buyer of \$1000 worth. "Why, then," asks the railway advocate, "have not the railway managers the same right to give one shipper better rates than another? We have seen that such discriminations are often forced upon them. These are business corporations conducted for the purpose of making money, and as a merchant secures a large transaction by a lower rate, what justice or reason is there in refusing the railways a like privilege?" This argument has been qualified in recent discussions by the admission that no "unjust discriminations" should be allowed. But the principle of the plea demands a short examination.

If any merchant, manufacturer, or broker had the power to make discriminations which would affect the prosperity of whole communities, or build up fortune for one person out of the adversity of his rivals, ought not the law to take away that power? If a Stewart or Astor had obtained such a control of trade that he

could compel western New York to pay more for its cottons, its clothing, or its groceries than Illinois or Iowa, or could sell to a select few of the thousands of retail merchants at prices that would give them a practical monopoly, would the public necessity for abolishing such a dangerous power be hindered by any plea of individual rights? The privileges of feudal lords scarcely involved greater control over the welfare of the people than such mastery of their commercial life; but the civilized world abolished them hundreds of years ago. Under our institutions there can be no private property in the liberties, lives, or welfare of the people. I cannot believe that after we have proved, by a century of experience, the wisdom of abolishing all royal or feudal control over the prosperity and freedom of the masses, we shall permit a more arbitrary and irresponsible sway to be established over our commercial liberties either by corporate or individual plutocrats.

But the fact that no individual merchant ever has obtained such a power, marks the difference between the position of the greatest private trader and that of a railroad corporation. Let Stewart and Claflin favor one dealer as they will; others can get relief by dealing with other merchants—and if they cannot buy elsewhere as cheaply as their favored rival does of the great merchant, the loss comes out of the latter's pocket. As long as the dominant power holds no franchise under which it can throw the cost of its favors on those against whom it discriminates, no public rights are attacked. No merchant can hold such a power unless, as we have seen, the monopoly is placed in his hands by the favor of the railways. This contrast between

the ability of the greatest and most successful traders and that of the weakest and most bankrupt railway in the exercise of discrimination, illustrates the differences in the sources of their powers and in their public obligations. The merchant owes his wealth and importance in the market to his own ability and industry, and, however great that wealth and power may be, the competition of others is a perpetual safeguard against favoritism which will build up one class or locality at the expense of others. The railway owes its existence and creation to the state. Its power over transportation rates does not come from ability or industry, but begins as soon as the tracks are laid, and continues throughout its career, no matter how extravagantly or recklessly it may be managed. It is the legislation which gives it existence and enables it to build and control the road from which the power to make discriminations is drawn. It is a vital point that the railways occupy an entirely exceptional and unique position, (1) in that they alone can make discriminations so as to affect public interests, and (2) in that they derive this power entirely from the legislation which has given them existence. The character of that legislation has been such as to justify the imposition of restraints upon the railways wherever they threaten the public interest. It rests upon powers which can be wielded only for public purposes; and the employment of which, in the creation of the railways, clearly implies that they were created for the benefit of the people, that the public welfare is their supreme end. The right of the railway to exist rests upon its character as a public highway. This character is the sole justification of the extraordinary acts of power by which the state gave

the railways existence, and of the legislative favors by which the railway system has been developed. In this character too lies the foundation of the public obligations of the railways. Having accepted the advantages and powers which public policy grants to aid the construction of public highways, they are bound to perform the duties which attach to that character and to respect the public rights affected by it.

The agency of government in giving corporate existence to the railways, and in aiding the construction of a large number of them by subsidies and public loans, is enough to support the claim that the public interest should be paramount in controlling their operations. But a further exertion of governmental power has been made in behalf of every railway in the country; one which is requisite to their construction, and which fully stamps that construction as a public purpose and not a private business or speculation. The state has exercised its sovereignty in appropriating and condemning land for the right of way, without the consent of the owners.

The right of eminent domain, or the power of the government to take private property for public purposes without the consent of the owner, upon such compensation as may be fixed by legal process, is one of the supreme powers of government. It is founded upon the principle which holds states together, that private rights must always be held subordinate to the public need. But this principle implies that the power in question cannot be exerted save for a public purpose. The right of every man to hold his property at whatever price he chooses, or to refuse to sell it at any price, is indefeasible against any right except that of

the government for public purposes. If the state should force one man to sell his property at a valuation for another's private use, this would be an act, not of sovereignty, but of tyranny. But it is an equitable and beneficial practice of every civilized government to appropriate the land of private owners, upon just compensation, for such public uses as the construction of state buildings, or of public highways.

Since the days of the Roman empire, the establishment of public highways has been recognized as a function of the government in every civilized state; and it is for this end that the power of the state has been conferred upon the railway companies to seize the land needed for their right of way. Before railways were thought of, the same power had been granted to companies for the construction of highways in the form of canals, turnpikes, or plank roads, and for the improvement of natural water-courses. The grant in the same manner, of the power of seizure, under the state's eminent domain, shows that the railway was, from the first, recognized by the law as a public highway, in exactly the same legal relation to the state as the canals and turnpikes. This exercise of sovereign power was absolutely necessary for the creation of the railway system. Experience shows that no railroad twenty-five miles in length can be built without the resort to the power of the state, for there are always some proprietors who demand an exorbitant price or altogether refuse to let the railway pass over their property. No railroad of greater importance than a mere switch ever has been or ever can be built without invoking the sovereignty of the government in its behalf.\*

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\* Within the personal knowledge of the writer a number of private



Not only was it the plain purpose of legislation to establish public highways by these acts, but that was the only purpose for which the power could be exerted. This is a constitutional country in which the rights of the citizen are carefully guarded against encroachment, even by the legislature, and any attempt to appropriate property for other than public uses would be unconstitutional. This is a point of vital importance. Some writers seem to imagine that the railways are not subject to the restrictions and obligations of public highways, but own and control their tracks as absolutely as a manufacturing corporation owns its mill. This view ignores the rights of private ownership. If the state should assume to empower A to take B's land by legal process, paying the price assessed by a jury, and to use it for his private residence or private business, every one would see in this a most arbitrary and outrageous abuse of power, and every court would unhesitatingly pronounce the act unconstitutional and void. Yet this is exactly the claim of the railways, when they assert their independent ownership of tracks and rights of way that have been obtained by this exertion of the sovereign power. If it be true that their roads are not public highways, then they have no legal right where they are, and could be dispossessed of their tracks by an appeal to the courts. The power of the state to take the land of private citizens can only be exerted for public uses; and the sole public use of the railways is as highways for merchandise and pas-

capitalists wished to build a railway to their coal mines, through ten miles of country where they were well known and very influential. In order to avoid the trouble of incorporating themselves, they tried to buy the right of way by private negotiations, but were forced to resort to incorporation and the right of eminent domain.

sengers. The railway, no doubt, when conducted with due regard to the public requirements, is such a highway as truly as the turnpike. If it were not, the legislative acts under which the railway system was built up would be null and void, and the entire railway system would be a mere product of violence and fraud, without legal justification.

This principle was recognized, formally at least, by Messrs Vanderbilt and Jewett, in their letter to the New York legislative investigating committee. They declared that "it is the primary duty of the state to furnish 'highways,' whether they be the road, the canal, the turnpike, or the railroad, the state alone having the right of 'eminent domain.'" But, notwithstanding this admission, many writers in the interest of the railways have denied that they are public highways. This denial is indeed necessary to their consistency, if they deny the right of the state to regulate these highways in the public interest. Mr. George Ticknor Curtis, the most eminent of these writers, brought forward the theory of private ownership, in 1880, denying the assertion of Judge Black that railways are public highways and consequently held subject to public uses. His claim that the railways must be exempt from legislative regulation has been echoed by the advocates and organs of the railway theory. A very respectable example of this class was Mr. W. F. Crafts, who, by giving a fair statement of the claim that the exercise of the right of eminent domain in behalf of the railways invests them with the character of public highways, earned the right to a tolerant hearing. But, while stating the case fairly, he could not give up his preconceived ideas of private ownership. Admitting that the view we main-

tain may be plausible in theory "and evolved from some old principles of law," he declared that it is not "true in fact." In one sense it may be untrue in fact. The railways, as generally conducted, may correctly be asserted to have lost the impartial character and freedom of competition which are the essential features of public highways. This is, indeed, the principal count of the indictment against them: that they have changed their character, betrayed the public purpose for which they were established, and adopted practices and methods wholly inconsistent with the nature of public highways. But Mr. Crafts means that it is "untrue in fact" that the railways rest upon the legal foundation of the public highway. He has attempted to prove this by asserting the legislative power of "the necessities of modern progress,"\* which, in his opinion, have, within the last fifty years, made it constitutional and right for the state to take away the property of A and give it to B for the latter's private use and behoof—provided always that B is a railway corporation. But this argument is two-edged and cuts both ways. If the necessities of modern progress justify the invasion of the rights of private property for the benefit of one interest, they will justify a similar invasion of those rights for the benefit of a greater interest. It is as necessary to keep the avenues of commerce open to competition

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\* "The necessities of modern progress rendered a modification of old theories, and even of old principles, inevitable; and since the introduction of railroads, the idea that private property taken for the purpose of travel in a peculiar manner and under new conditions is a public highway, is no longer tenable and in practice is not recognized. The old theory of the rights of the public in such a road was necessarily modified in practice, though it still lingered in the minds of some jurists."—W. F. CRAFTS, *Scribner's Monthly*, Oct., 1881.

and to put down monopolies as it is to furnish cheap rights of way to railroad corporations. Grant that such a necessity may take away the property of citizens and make it the property of corporations, it may well go a step further and take away the property of the corporations to be the property of the state. Certainly if modern progress can amend constitutional principles and invade the right of property, it can do so to no better end than to guard the freedom of commerce and promote the welfare of the public.

This theory of the private proprietorship of the railways is founded by Mr. Crafts, one of its typical advocates, on the practice of the present times. "The old theory of the right of the public in such a road," he says, "was necessarily modified in practice." It makes a vital difference, as to the pertinence and accuracy of this statement, whose practice it is that is supposed to repeal fundamental and time-honored principles of law. It is true that the practice of the railways does no longer recognize the principle of the public highway. But does the practice of those whose private interests lead them to override fundamental principles of law amount to a repeal of that principle? It is an old principle that public office is a public trust, to be administered for the welfare of the entire nation. If this principle has not been recognized in practice, and officeholders have violated it, using their offices to make money or to strengthen their parties, does the principle become false? Perhaps the effort to make the public interest the supreme end of the public service might be met by the assertion that the public interest must be made subordinate in the management of the government, because the practice of the politicians in office



has long modified the old theory, and made the offices the property of political rings. Few professional politicians have the assurance to adopt such a view, but it is exactly parallel to the claim of the railways to private property in their lines. In each case the argument is, that because rights and public obligations have been persistently ignored, *therefore* the principles of law on which those rights and obligations rest are abolished.

If it is meant to assert that the practice which has abolished these principles is the practice of the courts and legal authorities, the assertion is incorrect. The public obligations of the railways may rest upon "old theories" and be "evolved from old principles of law," but theories and principles may be none the worse that they are old and long established. The old theory, that the railway is in its legal character a public highway, has been affirmed in its clearest and most positive form by the highest and most authoritative judicial tribunals of the land. Old principles of law which have been declared essential and fundamental by the Supreme Court of the United States, and by the courts of last resort in New York, Pennsylvania, Massachusetts, Vermont, and North Carolina in the early days, and of many other states, including a reassertion in the United States Supreme Court in the later stages of railway development, claim some respect in the minds of the public, however lightly railway advocates may subordinate them to imagined necessities of modern progress. The doctrines which were laid down at the beginning of the railway system by such authorities as Walworth, Baldwin, Shaw, and Black, have in its later and greater growth been reaffirmed and ap-



plied by Waite, Strong, Miller, Clifford, Agnew, McCreary, Baxter, and Redfield. The combined authority of the higher courts and the recognized text-books has from first to last recognized, as a fundamental principle in the constitution of the railways, that they were created by sovereign powers, which could only be exercised for public uses, and which made the public rights the supreme obligation in their administration.

It is a pregnant fact, too, that the strongest and most complete assertion of the view that the railways are public highways, has been given by the courts for the benefit of the railways themselves. The earlier cases all arose from the attempts of land-owners to resist the seizure of their land by the railroads. This issue was drawn very clearly in the case of *Beekman vs. The Saratoga and Schenectady Railroad*, decided by Chancellor Walworth in 1831.\* It is amusing to find that in this case the same argument was used against the railroad which is now offered in its favor. The plaintiff insisted that the railway could not be a public highway, because farmers and travellers could not use their own vehicles upon it. To this the counsel for the railway replied, that it would be a public highway for the vehicles suited to it, and the eminent jurist who decided the case adopted that view in a decision which laid down in clear and exhaustive terms the following fundamental principles: "(1) Railroads are public improvements for which the legislature can authorize the appropriation of land on just compensation to the owner; (2) the privilege of making such a road and taking tolls thereon when

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\* 3 Paige, 45.

granted to an individual or a corporation is a franchise subject to the public interest and under legislative regulation; (3) the sovereign power could not take the property of one citizen and transfer it to another, even upon full compensation, except for public purposes, and an act of the legislature doing so would be repugnant to the Constitution of the United States."

The same principle is set forth still more decisively by the Supreme Court of the United States in the case of *Bonaparte vs. The Camden and Amboy Railroad*.<sup>\*</sup> The ex-king of Spain resisted the right of the railway to appropriate his land for its tracks, on the ground that it was not for a public purpose, but for the use of a monopoly. The final decision of the case by the highest tribunal of the nation clearly laid down the principles on which the public control of the railways is now asserted. The opinion of Justice Baldwin followed out the precedent already instanced by holding that "a road or canal is for public use, when the public have the right of passage on paying a stipulated, reasonable, and uniform toll." But he made a proviso which should be full of warning to the railway corporations of the present day, by asserting that, "if the toll amounts to a prohibition it is a monopoly and the road is not public." The absolute necessity that the road should be a public highway, not only in name but in fact, was also affirmed, and the court declared that if the law was open to the objection that the road would be used solely for the private benefit of the corporation, the objection would be fatal, "as it is opposed to every constitutional principle which pro-

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\* 1 Baldwin, 205.

fects the right of property, to take from the lawful owner and appropriate it to the private use of another, or a private corporation for its own use." Such a transfer was ruled by the court only to be valid when it was an appropriation to a public use; and if the railways succeed in establishing the theory of private ownership, every rod of their tracks must, under this decision, revert to the original owners, or be held in defiance and usurpation of the rights of private property as laid down by the highest court of the land.

Many decisions of the highest state courts in the early days of the railway system were emphatic in rejecting the idea that railways could be anything else than such highways. This was done in the interest of the railways themselves. The railway lawyers saw that, unless their public character was made indisputable, their very life would be imperilled by their inability to take the land necessary for their tracks. The decisions in which this principle has been repeated by the courts of Massachusetts, Connecticut, New York, Vermont, Pennsylvania, Maryland, North and South Carolina, Ohio, Iowa, and Minnesota would of themselves more than fill this volume; some of the most important of the earlier decisions were made by the Supreme Court of Pennsylvania. It is significant that while the Supreme Court of Pennsylvania is now considered the stronghold of the great railway corporation of that state, the principles laid down in its decisions of 1853 and 1856 have never been set aside. The first great railway question decided by this court was that of the constitutionality of municipal subscriptions to aid in the construction of railways, and Judge Black

held that such subscriptions under acts of the legislature were constitutional, solely on the ground that they aided the construction of a public highway.\* Three years later the same court gave another decision involving the forfeiture of a railway charter, in which the utter subordination to the public use and public control of all property taken by the right of eminent domain was declared in the strongest terms.† The lands for the road, as the court said, "were taken for public use; otherwise they could not have been taken at all." The principle that railways were public highways was declared to be the sole justification for appropriating land, for making municipal subscriptions, for fixing tolls, or granting to corporations or individuals the right to build and operate such roads. "A public highway," said the court, "is not private property any more than a public office," and when the corporation forfeits its charter "by misuser or abuse of its corporate privileges," or by "any act in derogation of public right," the public highway reverts to the control of the state, and the franchises of the corporation in the road are extinguished.

But we are told by the railway advocates that these are old theories, and that the necessities of modern progress and the practice of the latter-day railway system has overruled these decisions of twenty-five and fifty years ago. It becomes a question of interest therefore to inquire at what time the constitution-making power of modern progress overruled the decisions of the supreme legal tribunals. That rather indefinite judicial influence had evidently not reversed the decision of the

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\* *Sharpless vs. Mayor of Philadelphia*, 21 Pennsylvania, 147.

† *Erie and North East R. R. vs. Casey*, 2 Casey, 287.



older courts in 1869, when Chief-justice Redfield, in his standard work on the law of railways, reaffirmed and sustained by a host of authorities the three principles: (1) That railways are public highways; (2) that unless they are public highways it would be beyond legislative power to exercise the right of eminent domain in their behalf; and (3) that the railway corporations obtain from the exercise of that right only an easement in the land condemned for their use.\* Nor had the change taken place in 1872, when the Supreme Court of the United States repeated the doctrine that the railway is a public highway with especial force and particularity of detail.† The declaration of the principle in this case is the more significant in that it was made by Justice Strong, with the concurrence of Justice Field, both of whom took the side of the corporations and dissented from the application of practically the same principle in the more famous, but not more decisive, Granger cases. In the first case, the principle was asserted in behalf of the railways; as it established the constitutionality of a public loan in their aid. But it was no less conclusive in its assertion of their public character and public obligations. Justice Strong not only declared the railroad a public highway, but asserted that the right of eminent do-

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\* Redfield on Railways, ch. xi. 229, says: "That railways are but improved public highways and are of such public use as to justify the right of eminent domain by the sovereign in their construction is now almost universally conceded. *Williams vs. New York Central*, 18 Barb. 222, 246; *State vs. Rives*, 5 Ired. 297; *Northern Railway vs. Concord and Claremont Railway*, 7 Foster, 183; *Bloodgood vs. M. and H. Railway*, 18 Wend. 9, and 14 Wend. 51; 1 Bald. C. C. Reports, 205, see also page 73; 3 Seld. 314."

† *Olcott vs. Supervisors*, 16 Wallace, 678.



main could not be used in favor of a railway corporation for any other purpose. As if to forestall the plea that the railway could be regarded as a public highway only for the purpose of condemning the land, and as a private corporation in other respects, the language is decisive that the claim that they are "public only with respect to the power of eminent domain" is a mistake. "In their very nature they are public highways." This decision, uttered by the justices who are now regarded as the most eminent railway judges, decisively refutes the idea that the public character of the railway is an obsolete theory.

This doctrine, first established in behalf of the railroads, has been reaffirmed in the later decisions, both to establish their legitimate rights and to curb their unwarranted pretensions. It has been their justification in thousands of cases in which the land of private owners has been taken to secure rights of way for railways. It has been asserted as authorizing county and municipal subscriptions to aid their construction.\* It is true that for many years the fundamental principle was so far forgotten and discarded in the practice of the railways that Judge Black's enunciation of it was called by the press a novel and extreme doctrine. That it was, instead, the doctrine on which the railway system was ushered into existence and on which its entire growth was based, has already been shown. It seemed novel and extreme to those who inferred from the neglect and defiance of the law by the railway corporations that it did not exist. Those who have examined the clear rulings of the high courts

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\* *Rogers vs. Burlington*, 8 Wallace, 654.

by which the legal status of the railways was defined, or noted the multitude of cases in which these principles were repeated,\* know that they are neither novel nor obsolete, but that they form the legal foundation on which the railway system of to-day has been built up.

It is well to note here that the rights of private property are the very foundation of the claim of the public for the restraint and regulation of the railways. It is customary for railway advocates to attack this claim as "an assault on property rights." A thorough comprehension of the principles laid down by the courts will show that the assault on property rights is made by the opponents of railway regulation. Thousands of miles of land have been taken, without the owners' consent, to furnish tracks for the railway. If this was for the private benefit of the companies, it was simply taking away the land from one owner and giving it to another, an outrage and invasion of private rights which no legislative power would be competent to make; which, as the Supreme Court of Penn-

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\* If the somewhat voluminous citations already made to establish the validity of this important legal doctrine should be deemed insufficient, the reader can find them reaffirmed in the following references given in Redfield on Railways, and sundry other opinions: *Williams vs. New York Central*, 18 Barb. 222, 246; *Northern Railway vs. Concord and Claremont Railway*, 7 Foster, 183; *Bloodgood vs. M. and H. Railway*, 18 Wend. 9, and 14 Wend. 51; see also 3 Seld. 314; *Bradley vs. New York and N. H. Railway*, 21 Conn. 294; *Symonds vs. City of Cincinnati*, 14 Ohio, 147; *Embury vs. Conner*, 3 Coms. 511; *Talcott vs. Township of Pine Grove*, 1 Flippin, 144; *People vs. New York Central Railway*, Daily Register, February 10th, 1883; *Railway Company vs. Maryland*, 21 Wall, 470; *Lumford vs. Stearns*, 4 Cush. 61; *Prosser vs. Wapallo Company*, 18 Iowa, 327; *Slater vs. Boston, C. and M.*, 25 Vermont, 433. Further citations are made, as Redfield says, "almost to infinity," but the reader will be of opinion that these are sufficient.

sylvania said, "would be a rescript and not a law." The denial of the public character of the railway deprives the railway system of any title to the protection of the law, and leaves its creation and preservation a mere trespass. It is only as public highways that the existence of the railways can be reconciled with the rights of property. The actual regulation and control of these highways in the interests of the public is the sole method by which these rights can be vindicated. It does not help them to recognize the principle in theory while rejecting it in practice. It is a mere paradox to say that the railways are public highways for the purpose of appropriating the land of private citizens and receiving public aid, and not to regard them as under the obligations of public highways, to grant equal and reasonable privileges of transportation and travel.

That this is still the controlling principle of railroad law is shown by the later decisions. In the first place it is by this principle that the building of some sixty thousand miles of railway has been accomplished. No ten consecutive miles in any settled section of the country could have been built without invoking this principle in order to condemn private property for public use. Again, recent decisions affirm and enforce the right of the legislature to authorize the use of public funds by counties and municipalities in aid of railways as a public purpose. There are cases, too, in which the right of the railways to defy this principle has been challenged. A few of these have been brought to trial, notwithstanding the tactics of the railway counsel; and the courts have declared arbitrary discriminations illegal, and have awarded damages for

such offences. Finally, there are successive decisions by the Supreme Court of the United States, as well as the state and circuit courts, in which the full right of the state to control and regulate the railways and fix the rate of tolls has been clearly established. In these decisions, it is true, the function of the railways as common carriers is made more prominent than their function as builders and operators of public highways. This fact has contributed to turn away the attention and thought of the public from one side of the twofold character which the railways sustain in their relations to the community. The important distinction between these relations will be discussed in another chapter. It does not, for our purpose, affect the weight of these decisions, in which the public duties and obligations of the railways are founded upon the principle laid down by the judges of the preceding generation, that they are public highways; and then are further sustained by showing that, as common carriers, they are so affected with a public right as to be subject to governmental regulation and control.

The right of the state to regulate the railways has been affirmed by numerous decisions of the highest state and federal courts. These decisions are so recent and so well known that it is not necessary to discuss them so fully as the earlier and more fundamental ones. Indeed, they only apply the principles previously settled, in affirming the right of the state to prevent abuses and to regulate the operation of the railways. But they are important in defining the powers of the state in detail as applied to the developments of the modern railway system. It has already been said that the conception of the railway as a public



highway was the foundation of the decision of the famous Granger cases by the Supreme Court of the United States. The doctrine is not indeed specifically affirmed there. But the omission is more than supplied by the distinct declaration of the principle made by the same court four years earlier. Although there were some singular changes in the position of the members of the Supreme Court\* between the decision of this case and that in the Granger cases, the latter applies the principle and carries it further, founding the regulative authority of the government upon the public use or interest in a business, without reference to the exercise of the right of eminent domain in its establishment. In the first of these cases, *Munn vs. Illinois*, the Supreme Court held that an act of the legislature regulating the charges of grain elevators and warehouses was constitutional, solely on the ground that the state may regulate any class of business which has become affected with a public use.† The other cases dealt directly with the power of the state over the railways, and in all these cases the decision unreservedly affirmed the power. The doctrine was not new. Chan-

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\* It is noticeable that while the decision in *Olcott vs. The Supervisors*, which sustained a public loan in aid of a railway, was upheld by Justices Strong and Field, on the ground that it is a public highway, the same judges dissented from the decision in the Granger cases, that the legislature could regulate the charges of the corporations. On the other hand, Chief-justice Waite and Justice Miller, who had dissented from the first decision, delivered and sustained the rulings in the five cases of 1876. This contradictory position may afford an explanation of the absence of any reference to the doctrine of the public highway in either the affirming or the dissenting opinions in the Granger cases.

† *Munn vs. Illinois*, 4 Otto, 113; *C. B. and Q. R. R. vs. Iowa*, 4 Otto, 155; *Peik vs. C. and N. W. R.*; *Winona and St. Peters vs. Blake*. These cases are all reported together.



cellor Walworth had asserted it as early as 1831. In the Camden and Amboy case, the right of regulation on the part of the state had been recognized, though not perhaps directly affirmed, by the United States Supreme Court. In the Granger cases, however, these rights were fully declared, and some important details were discussed. In some of them the subject of state and inter-state commerce was considered, and the right of a state to regulate such inter-state commerce as affects its citizens, in the absence of action by Congress, was clearly affirmed. One case involved the meaning of a grant of power "to fix reasonable rates," and it was held in that and in the next case that it lies wholly with the legislature to determine what rates are reasonable. Another decision gave an indirect assent to the assertion, made by the supreme court of a state, that a legislature cannot alienate its right of regulating a corporation intrusted with the operation of a public highway.

The regulation of the railways by the state has been most frequently opposed by the claim that the chartered rights of the corporations are violated by it. Commencing with the declaration of Chancellor Walworth that: "The legislature may, from time to time, regulate the use of the franchise and limit the amount of the toll which it shall be lawful to take, unless they have deprived themselves of that power by a legislative contract with the owners of the road," the question arises: first, what constitutes such a contract; and second, have any such contracts been made by the legislatures with the railway companies? In regard to this reason and law agree that the right of the state to regulate its public highways cannot be easily for-

feited by the legislature. The rights of the public in the management of the creatures of the state are not to be defeated by implied contracts or indirect grants of power. It is a universal rule for construing all such grants by the state that its powers of supervision and control are not to be waived except by the most direct and plainest terms. Even when made in such terms the action is subject to the constitutional limitations which affect the power granted. If the legislature cannot exert the public power to create a monopoly, as declared by the Supreme Court of the United States in 1842, it cannot delegate a power which would have that effect to any of its corporate creatures or subjects.

The principle that the grants in all charters must be construed strictly against the corporations, and that when there is any doubt it must be resolved in favor of the state, or, in other words, that it must be presumed that the law will preserve the public right as against its creatures, makes it clear that no implication or deduction from the charters can establish a contract, such as Chancellor Walworth speaks of, by which the legislature surrenders its power and duty to regulate the use of the public highways for the public welfare. This is affirmed in its strongest terms by such authorities as Cooley, Greenleaf, and Redfield, as true of all corporations, and in particular of railways. Greenleaf further raises the very pertinent question whether one legislature can barter away the powers of succeeding legislatures, and answers it decidedly in the negative.\*

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\* Greenleaf on Cruse, note, pp. 67 and 68. See, also, Taney's statement of rules of construction in *Charles River Bridge Co. vs. Warren Bridge*, 11 Peters, 544.

These rules of the most authoritative text-books are based upon the strongest utterances of the highest courts in the land. In the early period of corporate growth, Taney and Black put them in forcible language, and they have, of later years, been repeated and applied with equal weight of authority and strength of utterance by the Supreme Court of the United States,\* as well as the circuit and state courts. These authorities make it clear that the power of the state over the corporations can only be abjured by the most direct and specific language, and especially that nothing could bind the state not to protect the rights of the people on the public highway, short of an explicit agreement on the part of the legislature, to quote the language of the United States Supreme Court, "not to do the acts" which the railway would desire to prevent. Has any such agreement ever been made by the legislature of any state, not to regulate the railways so as to preserve their public character? Do the railway charters contain any express agreement on the part of the state that it will not secure by law equal rights to the public on the highways, or that it will not compel the railways to supply adequate and impartial accommodations to all alike? Have any charters ever been granted in which the legislature declares that neither itself nor its successors shall ever exercise its power to limit or fix the amount of toll? When such

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\* "The rule of construction in this class of cases is that it shall be construed most strongly against the corporation. Every reasonable doubt is to be resolved adversely. Nothing is to be taken as conceded but what is given in unmistakable terms, or by an implication equally clear. Silence is negation and doubt is fatal to the claim. This doctrine is vital to the public welfare. It is axiomatic in the jurisprudence of this court."  
—*Justice Swayne*, 97 U. S. 659.

an extraordinary instrument is produced, it will be time to inquire whether, according to the question raised by Greenleaf, any such action can be taken. "Any act of the legislature disabling itself from the future exercise of powers intrusted to it for the public good is void, being in effect a covenant to desert its paramount duty to the people." Or, if that authority is not final, such a provision in a charter would raise the still graver question suggested by the Supreme Court of the United States in the Camden and Amboy case, whether it does not rob the road of the character of a public highway, and thus destroy the validity of the grant.

It is sufficient for all present purposes that no agreement has ever been made by any legislature, in which it distinctly and in direct terms abjured its right of regulating the railways which it chartered. The establishment of this fact by the decisions of the courts goes into detail far beyond the general affirmation of the Supreme Court in the Granger cases, and completely overturns the claim, with regard to the most important feature of the charters, which the railway lawyers have set up as constituting an inviolable contract. This argument has been that the grants in the charters of the railways of the right to take tolls, which in some cases were left indefinite, constituted an agreement that the railway corporations should always have that right. On this construction of the charters, by an implication which is declared inadmissible in the rules already quoted from Taney, Swayne, Cooley, Greenleaf, and Redfield, the claim has been set up that acts limiting the rates of toll on the railways were unconstitutional, as impairing the obligation of the contract



between the state and the corporation created by its charter. This claim has been expressly denied by the state courts and the circuit courts of the United States, in cases which covered the entire range of the instruments by which the right to take tolls has been given in state charters. In a case before the Minnesota Supreme Court, affirmed by the Supreme Court of the United States, a construction by implication was allowed, to the extent of holding that where a charter did not expressly give the railway company the right to take toll, that right was to be understood as an essential feature of the enterprise; but the court still recognized the power of the state by subsequent enactment to fix and limit the toll which could be taken by the corporation.

This is only decisive as to instances in which the charters do not expressly give the right to fix tolls, and might leave the vast majority of charters in which that right is expressly granted open to construction as contracts, if those charters were not also fully covered by judicial declarations that they do not amount to a contract which prevents the passage of further laws on the subject. In the prominent express cases decided by Justice Miller, of the United States Supreme Court, and Judge McCrary of the Circuit Court,\* the right given in the charter "to transport all articles usually carried on railways and to charge and receive such tolls and freights therefor as should be for the interest of the corporation," and the further grant of authority to the directors "to establish such tolls and to alter the same from time to time," was urged on behalf of the defendants. Here was apparently an unlimited

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\* Southern Express cases, 10 Fed. Reporter, 210.



grant of power with regard to transportation and the fixing of tolls. Yet these eminent judges held that it presented no obstacle to the rights of the plaintiffs. Another case in which the construction of these indefinite grants of power to fix freight rates was prominently involved was that of Wells, Fargo, & Company *vs.* The Oregon Railway and Navigation Company. The railway corporation interested in this case was empowered by its charter to collect such "tolls or freights as the corporation itself may prescribe," which Judge Deady held to mean no more than a grant to take reasonable tolls.\* The strict construction of these charters by the courts, in the application which the railways sought to make, is decisive as to the power of the state to fix and regulate the rates and operations of the railways. If the right "to charge and receive such tolls as shall be to the interest of the corporation," in one case, and in the other, "to collect such tolls as the corporation itself may prescribe," does not, as these courts justly decided, imply the right of the corporation to disregard equity and impartiality in fixing their charges, it is far more impossible for it to imply that the legislature has in any such indirect manner deprived itself of its right and duty to regulate the tolls as the public welfare shall require.

One class of charters, which perhaps comprises the majority, does not seem to be covered by these decisions. The instruments which fix a maximum of rates that the railway is authorized to charge, appear to contain a specific grant, which, if anything could do

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\* Wells, Fargo, & Company *vs.* Oregon Railway and Navigation Company, 15 Fed. Reporter, 561.

so, would constitute a contract or agreement between the state and corporation. Such charters have, of late years, constituted the stronghold of the railway lawyers against the right of the state to regulate their corporations. Most certainly if the direct grant of the power to railway corporations to collect certain rates stipulated in the charter does not imply that they shall always possess that right, superior to state enactment, no other provision can possibly do so. Such an implication is, however, contrary to a fundamental rule of construction, and the most thorough application of that rule yet extant was made by the Supreme Court of Georgia in a comparatively recent case.\* The charter under review in this suit clearly fixed the maximum rates of freight which the railway corporation was authorized to charge. The right of the legislature to alter and further to limit those rates was the point at issue; the complaint of the railway alleging that the commission appointed by a subsequent act of the legislature had established rates much below the limit fixed in the charter of the corporation. Upon this issue, the court, in a very convincing opinion, showed that no such grant carried with it the understanding that the state would not in future exercise its constitutional privilege of regulating the charges of the railway. "The words of the charter parting with that right," said the court, "must amount to a positive contract," and "nothing short of an absolute, direct agreement that the state will not use its right, can under this rule of law prevent it from doing so."†

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\* Georgia Railroad and Banking Company *vs.* Commissioners, 70 Ga. 694.

† The same act was sustained by the United States Circuit Court in

The foregoing pages give a clear idea of the authority on which the right of the public, to enforce the regulation of the railways and the prevention of abuses, is based. The weight of judicial opinion in favor of that claim is overwhelming. Mr. G. T. Curtis stands alone in denying that railways are public highways, in the face of every high authority that has ruled upon that question from Walworth, Shaw, and Baldwin down to Crawford, Ripley, and Baxter. Even Justices Field and Strong, whose dissent from the extreme application of the doctrine of public right in the case of *Munn vs. Illinois* has placed them in the attitude of judicial champions of corporate privileges, are wholly committed to the doctrine of the public highway, by their affirmation of that principle for the benefit of the railways four years before the decision of the Granger cases. In Mr. Curtis's assertion that "if there is no reserved power of revision or alteration of their charters held by the state, then they are a species of common carriers exempt from legislative regulation of their charters," he also stands alone against the rules of construction laid down by Taney, Swayne, and Cooley, and applied to exactly this subject by Waite, Miller, McCreary, Baxter, Deady, Ripley, and Crawford. It is wholly at variance with every idea of constitutional government for the benefit of the people governed, that it can take away the property of a private citizen, and give it to a corporation, to be used by the latter for its own private ends, without any respect for public welfare, or that the government can surrender its power to enforce the subordination of its own creations to the

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the case of *Tilley vs. The Savannah, Florida, and Western Railroad*, 5 Fed. Reporter, 641.

public purposes which alone can justify the means employed to give them existence. Such a thing might be possible to an absolute tyranny. It is impossible in the constitutional government of a free people. It is impossible in a legal sense, as irreconcilable with the principles on which popular institutions must be founded; it is impossible in a practical sense, since, if it obtains permanent force and full sway in establishing gigantic corporate influences of as great or greater power than the government itself, the freedom and independence of the people will be irretrievably lost.

What is the primary object and duty of every public highway? Is it not to furnish facilities for travel and transportation to all classes alike? It is bound to furnish such accommodations as its nature affords to the whole people. All favors to individuals or grants of privileges to special classes are inconsistent with its public character. The millionaire can have no rights in the enjoyment of its services which the poorest tradesman or most humble workingman cannot obtain on equal terms. It makes no difference in the binding force of this obligation that the highway is placed in charge of a corporation, with power to reimburse itself for its expenditure in improvements and repairs, by levying tolls upon the traffic which is benefited by those improvements. The turnpike or canal company that constructs such a highway levies its tolls and obtains its profits subject to the public obligations which are an inherent part of its grant. Absolute impartiality is the first requisite of its public character. The tolls must bear equally upon all classes of its traffic with regard to the service performed. Its facilities



must be afforded without favor to all who seek to use it for the shipment of merchandise or for their own travel. The same acts of sovereignty having been employed in establishing the railways as in the case of the turnpikes and canals, the same public obligations and the same public rights attach to their operation.

The force and adequacy of these principles of constitutional law are shown by the complete and thorough application which the earlier definitions of the relations between the railways and the public have to practices which have attracted public attention only at a comparatively recent date. The idea that the company may so conduct its business as to afford cheap transportation to some persons and to exclude others from its benefit was expressly denied from the start. It is not permitted to charge higher rates to one person than to another. It must be "the usual rate of fare," said Chancellor Walworth; and as if to forestall the claim that the higher rate is the usual one, and the lower rate granted to favored persons the special one, the Supreme Court of the United States followed this up by declaring, in the Camden and Amboy case, that it must be "a stipulated, reasonable, and uniform toll." The forcible admonition is given in this decision that if the railway does not maintain these qualities in its toll, it is not a public highway, and the legislative acts by which it obtained its road are unconstitutional and void. The rates must not be excessive, but reasonable; they cannot be changed to apply to each particular case, but they must be stipulated; and they cannot be made different to different shippers or travellers, but they must be uniform. The idea of excluding any traffic by levying upon it rates that make it



impossible to be shipped, is forbidden in the clearest terms. "But if the toll amounts to a prohibition," says the report, "it is a monopoly and the road is not public," and in such cases "it is opposed to every constitutional principle which protects the right of property." Finally, the legal existence of the railway is not secured by the mere legal enunciation of its public character or the affirmation of its charter that it is a public highway, while its actual operation ignores that public character. It must be operated as a public highway in order to preserve the validity of its charter. "The declaration in the charter that the Camden and Amboy is a public highway does not make it so, if the effect of the charter is to give the exclusive use to the corporation," says Judge Baldwin; and in further definition he says, "the true criterion is whether the objects, uses, and purposes of the incorporation are for public convenience or private emolument, and whether the public can participate in them by right or only by permission." What may result from the failure or refusal to observe these fundamental principles is significantly set forth by the Supreme Court of Pennsylvania, in saying that charters can be forfeited for abuse and misuser of privileges which consist of any positive act in violation of the charter or in derogation of the public rights (set forth in the preceding extracts) wilfully done or caused to be done by those appointed to manage the corporation; "in which case," the court weightily said, "the franchises are, as a necessary consequence, returned to the state, and the road remains what it always was—public property." It is evident that these courts would have had little toleration for the idea of a highway that gives one shipper certain

rates and makes others for his competitors, so high as virtually to exclude them from market; or for the idea that the corporation controlling that highway may order the public to cease producing a certain class of merchandise, and to suspend operations for a stated period, on pain of being excluded from the use of the highway, or to sell certain products at a stated price under the same penalty. It is hardly possible to conceive what these judges would have said, if they had been confronted by the claim that all the corporations in the country might unite to maintain an artificial standard of rates; that one such corporation might practically say to the public that no goods should be forwarded over its public highway till another public highway had secured its share of business, for the benefit of the public highway interest at large; or that if the merchandise in question had yielded toll to the corporations controlling sundry public highways in divers parts of the land, it should be carried over this highway for less tolls than if it had not done so. But we may be sure that the vigor of the judicial vocabulary would have been severely taxed to express utter condemnation of such ideas, and the unqualified judgment that such acts are wholly repugnant to constitutional principles, and a gross infraction of the contract by which the public highway was founded. Upon the binding force and the utter indefeasibility of the public right to obtain impartial, equitable, and unrestricted privileges of transportation upon the railways the earlier decisions are as clear and unmistakable as in their declaration that the railways are public highways.

The decision of the later courts against the dis-

criminations which have formed the subject of the preceding chapters have been no less vigorous and decisive. No law with regard to the railways is more definitely established than that their accommodations must be extended to all persons on the impartial principle of exactly equal rates for equal services. A review of the decisions made by the different courts before which this question has come for adjudication, both in this country and England, not only shows that they have declared the necessity of equality in rates in the most decided language, but the cases in which they have asserted that rule cover the most vital forms of discrimination that have been made of late years, and establish beyond question the utter illegality of all such practices. One point with regard to these decisions deserves notice; and that is that none of them have ever been carried up to the Supreme Court of the United States. Abundant opportunity has been given to railway lawyers for testing this principle in the court of last resort, by its affirmation to the fullest extent in the United States circuit and district courts. Some eight or ten cases have been decided by those courts, in which various discriminations of the railways were entirely forbidden. In one prominent group of cases the attempt of the railways to exclude certain express companies from the transaction of business on their roads, either for the benefit of a favored company or for the purpose of concentrating the express business in the hands of the railway itself, was declared illegal; and the railways were enjoined to furnish to all express carriers who desire to use their road cars for the transaction of the business, up to their full capacity, upon exactly equal terms. In other cases the

discrimination against one stock-yard in a certain city for the benefit of another was made the subject of an injunction; while in yet another, the practice of giving rebates to the largest shipper was adjudged illegal, and damages were awarded to the smaller shipper to the full extent of the discrimination. The railways have not given up the practice of discrimination. Some of the identical forms of that abuse condemned by the circuit courts are still maintained on the leading lines. Whatever attempts are made by injured shippers to obtain a legal remedy for the abuse are fought in the lower courts with such pertinacity, and made so expensive, as to discourage all but the boldest or the most wealthy litigants. But the fact that the railways do not dispute the legal principle on which all the decisions against discriminations are founded, by carrying them into the court of last resort, amounts to a tacit acknowledgment of its legal correctness. In addition to the judicial condemnations of discriminations which can be quoted, we have, therefore, the practical confession of the railway authorities themselves, that the legal requirement of equal terms to all shippers cannot be successfully denied before the highest courts.

In the decisions which are to be cited on this point, two of the earliest among the American rulings were given by the Supreme Court of Pennsylvania. One of them is especially interesting, as involving a practice which is now the rule in the management of nearly every important railway in the land, and as being rendered by a judge whose subsequent dissent in the United States Supreme Court from the famous Granger decisions gives his authority peculiar weight,



when thrown against a common railway practice. The question was whether a railway can adjust its rates for carriage over its own line, so as to induce the shipment of freight, beyond its terminus, over the line which it wishes to favor? How illegal this is, appears from the declaration of Judge Strong, more than twenty years ago,\* not only that the railways cannot make such a discrimination for a third party, but that they cannot even do it for their own benefit as owners and lessees of the connecting roads. The practical and universal declaration of such roads as the Pennsylvania Railroad, that if the shipper will send his freight beyond Pittsburgh, by its connecting line, the Fort Wayne road, he shall have a better rate than if he is left free there to forward it by river, or by some other railway, or the exactly similar practice of the New York Central, in forcing the shipment of its through freight over its connecting lines, is, under the principle laid down in this decision, utterly illegal. That decision is wholly ignored in the railway methods of the day. But it stands uncontroverted, as the declaration of one of the highest living jurists, who is by no means a severe critic of corporate doings, that "It is not consistent with the public interest or with common right that they (the railways) should be permitted so to use it (their power of making rates for merchandise shipped on their lines) as to secure to themselves superior and exclusive advantages on other lines of transportation beyond the ends of their own road." This appears like extreme doctrine, especially when contrasted with the almost universal practice of the railway corporations. Yet it only follows the law as laid

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\* *Twells vs. Pennsylvania R. R.*, 3 *American Law Register*, 728.



down in a leading English case quoted as authoritative in American courts. In the case of *Braxendale*,\* the English court made a still more extreme application than the American courts have done. This case not only established the rule that the railway cannot adjust rates to secure business for its connecting or subsidiary lines, but it also laid down, in its extreme prohibition of discrimination against even a competitor of the railway in the carriage of freight, the principle of absolute equality of accommodation between shippers, which forms the foundation of the famous express decisions in the courts of this country.

It is noticeable, too, that in a case very similar to the express cases decided in the United States courts in the present decade, exactly the same principle of law was decided by the Supreme Court of Pennsylvania, thirty years ago, to be inherent in the principles on which the railways are founded. It is no new theory that has been enunciated by Justices Miller, McCrary, Baxter, and Deady, in holding that the railways are obliged to give equal rates and facilities to all express companies, and that they cannot exclude any such applicants for transportation, even for the purpose of carrying on the traffic on their own account. That decision was made in 1855,† and the necessity for repeating it only proves the irrepressible conflict which is constantly going on between the prevalent methods of the railway corporations and the principles of law on which they have obtained their existence. The enunciation of the same principles of law twenty-five years later was as thorough and forcible as in the

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\* *In re Braxendale*, 94 English Common Law Reports, 308.

† *Sanford vs. Catawissa and Williamsport Railroad*, 24 Pa. 378.

early vigor and independence of the Pennsylvania court. The force and effectiveness of these later decisions are perhaps increased by the fact that some half-dozen cases arising in four different states were all decided in accordance with this principle, and were all affirmed by a member of the Supreme Bench, upon the final hearing in the circuit court.\* In all these cases the various expedients by which the railways could seek to exclude an express company from the use of their roads, either for the benefit of a favored company or for the purpose of monopolizing the express traffic in their own hands, were brought into question. All of them, whether by refusing facilities to the disfavored companies, or by adjusting rates so as to place them at a vital disadvantage, or by a contract which gave the favored express carriers such an amount of space in their cars as to exclude the others, were held to be illegal and inadmissible. It was virtually adjudged that, neither by direct or indirect means, "could the railways "insist upon the exclusive right to do such business themselves, nor grant such to one express company to the exclusion of others, *but are bound to carry for every one offering to do the same sort of business upon the same terms.*" These plain and uncompromising declarations of the courts place a vast number of the prevalent railway discriminations under the ban of the law.

Another leading class of discriminations was shown to be illegal, and another plea, by which many instances of that abuse have been defended, was overthrown by a decision which declared rebates given to a large shipper, based solely on the amount of freight shipped by

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\* Southern Express cases, 10 Federal Reporter, 210.

him, to be "violative of the equality of rights guaranteed to every citizen." \* Upon the plea that the large shipper is entitled to the lower rate, the favors granted to the Standard Oil Company, as well as numerous cases of less notorious discriminations, have been justified by the railways. No other apology has been offered or, indeed, exists; and how utterly the adequacy of that defence is rejected by the law is shown in Judge Baxter's forcible denunciation of it. His vigorous statement of the results which follow that practice stands out as a condemnation of what has been done by exactly such illegal use of the railway power. The managers of the railways "would be quick to appreciate the power with which such a holding would invest them," could favor their friends to the detriment of their personal or political opponents, "or might demand a division of the profits" in interests to be affected by such discriminations, or finally might "extinguish competition, monopolize business, or dictate the price of coal or every other commodity to consumers." Judge Baxter says, "these results *might* follow" the use of such a power; but those who have studied the history of the Standard Oil Company, or of the anthracite coal combination, or investigated the numerous less prominent cases of discrimination in favor of the largest shipper, raised to that enviable position by the favor of the railways, know that they have followed it. His radical condemnation of the practice shows how flagrant a defiance of the principles of law and justice is comprised in that practice. "Capital needs no such extraneous aid," says the judge. It has many inherent advantages, but it "has no just claim,

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Hays vs. Pennsylvania Company, 13 Federal Reporter, 309.

by reason of its accumulated strength, to demand the use of the public highways on more favorable terms than are accorded to the humblest of the land," and to give it such favors "is a discrimination in favor of capital and is contrary to sound public policy, violative of that equality of right guaranteed to every citizen in the land, and a wrong to the disfavored party for which the courts are compelled to give redress."

Not only is this attempt to justify special rebates to favored shippers ruled out by the courts, but all contracts agreeing to carry for one shipper at a cheaper rate than for others fall under the same ban. Just such a contract as that by which the power of the Standard Oil Company was made permanent was decided by the Supreme Court of New Jersey,\* some years before that last violation of the public rights was perpetrated, to be "void as creating an illegal preference, and inconsistent with the duty of the railway corporations to observe to all men perfect impartiality."

One of the universal practices, by which the railways control some of the branches of business dependent on their services, is to dictate what warehouses or facilities for receiving certain classes of freight shall be permitted to exist upon their lines. This practice is most general in its application to the business of grain elevators and stock-yards. Yet any discrimination between such competing establishments has been decided by the Supreme Court of Illinois and the Circuit Court of the United States to be utterly illegal. The two Illinois cases † took into consideration the at-

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\* *Messenger vs. P. R. R.*, 36 New Jersey Law Reports, 407.

† *Vincent vs. C. and A. R. R.*, 49 Ill. 33, and *C. and N. W. R. R. vs. Illinois*, 56 Ill. 365.



tempt of the railways to discriminate between certain grain elevators at Chicago, and affirmed the legal doctrine that for a railway to attempt to divert shipments from one to another, either by a difference in charges, or by refusing to deliver the grain consigned to one such elevator upon any pretext, either of a contract to do otherwise, or of its own interest and practice, was "peculiarly defiant of its obligations (of the railway) as a common carrier." Such a practice, as Judge Lawrence put it, "might result in the creation of a system of organized monopolies in the most important articles of commerce, claiming existence under a perpetual charter from the state, and by the sacredness of such charter claiming also to set the legislative will itself at defiance." These decisions preceded by some years the thorough-going rulings of the United States courts upon discriminations, and in reality furnished a precedent for them in the high authority of Chief-justice Lawrence, that the fundamental principles of law, to which the railways owe their existence, demand absolute impartiality to all shippers, and that it is the duty of the legislature and the courts alike to enforce that rule. The same right was no less plainly affirmed by the Circuit Court of the United States,\* in a case where a railway had agreed, in connection with another railway, to deliver all the live-stock shipped over its road to the yards of the favored company, thus excluding the complainant from any competition in the business. The decision of Judge Baxter, like all his utterances on such subjects, was forcible and uncompromising. The railways "possess no such power

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\* *Coe & Milsom vs. Louisville and Nashville Railroad*, 12 Federal Reporter, 775.



to kill and make alive," and those injured by such action need not await the slow progress of a suit for damages, but can obtain a prompt relief by an injunction from the courts.

Finally, a very common class of discrimination is shown to be illegal, in the recent decision of the United States Circuit Court, that a railway cannot either exclude the freight of a connecting line, or give advantages to one connecting line over another in the rates at which freight is exchanged. Hardly any more common practice in the present conduct of the railways could be specified than that of making rates so as to cause all the through freight of a railway to go over the line, at its terminus, which it desires to favor, and practically to exclude other lines from any exchange or prorating of freights. But Judges McCrary and Hallett, in the Denver and New Orleans case,\* decided that every railway is bound to receive freight from all lines connecting with it, and to deliver freight to all as ordered by the shippers, on equal terms. This case not only establishes the right of railways to equal privileges in their dealings with others, but clearly implies that the division of freights referred to in the chapter on pooling is illegal.

These cases cover nearly all forms of discrimination between shippers. In the first place every one of them affirms the legal obligation of impartiality. In detail, they prohibit discriminations even for the benefit of other lines in which railroads have a legitimate interest; or to secure, for themselves exclusively, the express business over their own lines. The railroads may not ex-

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\* *Denver and New Orleans R. R. vs. Atchison, Topeka, and Santa Fé R. R.*, 15 Federal Reporter, 650.

clude a competitor from using their road and cars on equal rates with other shippers. Discriminations in favor of the shipper who furnishes the largest traffic are held to be illegal, and contracts to give one shipper a lower rate than others are null and void. All elevators, stock-yards, and other establishments for the receipt and handling of special classes of freight must be treated alike, and all other railways must have equal privileges and rates. When the courts, in such cases as these, insist on perfect equality for all customers of the railways, it is plain that no form of discrimination injurious to any shipper is tolerated in law. There is one class of discriminations upon which these decisions have no direct bearing; those in favor of one locality or city against another. But if it is illegal for the railway to differentiate rates so as to force business over its own leased line, or into its own elevator or stock-yards, how plainly is the same rule of equality violated by forcing traffic to one city or locality to the exclusion or decay of another? Not that the railways are or ought to be obliged by law to give as low rates to a non-competitive point as to a competitive one. The inequalities arising from the unequal workings of competition call for remedies deeper than mere regulative legislation. But all artificial inequalities of rates between different points are obviously as much in conflict with the impartiality required by law, and with public right, as any of the discriminations condemned in these decisions.

The legal principles cited in this chapter establish the right of the state to control the railways, and the public obligations implied in the very conditions of their existence. These rights and obligations are

founded in reason and justice. It is absurd to suppose that a representative government can create corporations with an irresponsible power over commerce greater than that intrusted to the government itself. If our institutions permitted such an anomaly it would call for constitutional changes to make it impossible. The preservation of popular rights, the prime object of our government, is incompatible with the growth of irresponsible powers, whether in the shape of feudal aristocracies or corporate plutocracies. It has been abundantly shown that the fundamental principles of law, as laid down by the courts, tolerate no such powers. These principles have been clearly declared and directly applied by authoritative judicial decisions. All that is necessary is to comprehend and apply them. The principles thus established may be stated as follows:

1. The railway is an improved and modern public highway for the transportation and travel to which it is adapted, just as canals and turnpikes are public highways for that to which they are adapted. It owes its existence to the exertion by the government of its power to establish highways, a power which even the government cannot employ for any but a public purpose.

2. The corporations to which the construction and conduct of these public highways are intrusted by the state can use their franchises for gain, in all ways consistent with their public character. To allow the private and pecuniary objects of these enterprises to supersede their public purpose would make private rights superior to public rights, would defeat the end for which they were created, destroy their public char-

acter, and render the acts by which they were created unconstitutional and void.

3. In the nature of a public highway the government which creates it retains the right and the duty of supervising and regulating it, so as to guard and maintain its public use. Every grant of a franchise in the highway is subject to this reserved power of the state, and it is doubtful whether the legislature can, even by a direct and explicit surrender of its control, divest itself or its successors of their power to protect the public in its enjoyment.

4. The fundamental characteristic of the public highway is the right of all persons to use it upon equal terms. Both as public highways and as common carriers the railways are bound to absolute impartiality, in equal charges to all persons for equal services, and in equal accommodations to every one seeking the use of their tracks. Any discriminations in the tolls or freight charges which give one individual or class an advantage over others, or any combinations to prevent the free use of their facilities, are illegal and destructive of their character as public highways.

These legal rights and obligations of the railways are defined by the common law. Its rulings are of peculiar value in this inquiry, because they not only declare the duties and the rights of the corporations, but also explain the principles upon which both their public rights and private duties are founded. But it is worthy of notice that the constitutional provisions of the leading states in the Union are fully as explicit as the common law in declaring the public character of the railways and in asserting their subordination to the legislative power in all matters affecting



the public interests. The "obsolete theory" that the railways are public highways finds direct enunciation in the most recently enacted state constitutions. In Arkansas, Alabama, Colorado, Illinois, Louisiana, Missouri, Nebraska, Pennsylvania, and Texas, the constitutions adopted within the last decade all declare that the railways are public highways. The constitutions of California, Georgia, Iowa, Michigan, Minnesota, and Wisconsin affirm the right of the legislature to regulate the operations of the railways, while many other states have practically asserted that right by its actual exercise, and it has never been successfully denied. Of the fifteen constitutions referred to, twelve explicitly forbid discriminations between shippers or passengers, while in other states a similar prohibition is implied by the constitution or bylaws made under its authority. Pools or combinations between different railroads to the prejudice of other railroads are forbidden by the constitutions of Arkansas, Illinois, Colorado, Georgia, Michigan, Missouri, Nebraska, Pennsylvania, and Ohio. Rebates and drawbacks are prohibited by constitutional enactments in Arkansas, California, Georgia, Missouri, and Pennsylvania, while the much-defended practice of charging more for a short haul than for a longer one over the same line is forbidden by the constitutions of Pennsylvania, Missouri, Arkansas, and California, and by the highly lauded statute law of Massachusetts. There is not a claim of the railway reformers, nor an enunciation of the courts, subordinating the franchises of railway corporations to the public interest, but finds explicit recognition in the most recent constitutions. The "old principles of law" which, according to railway advocates, have been repealed by the necessities of



modern progress, are incorporated in the clearest terms in the constitutional instruments that have been drawn up within ten or fifteen years.

These constitutions would prevent most of the railway abuses, if their provisions were enforced. But the dangerous power of the railway interest is apparent in the fact that in twelve states of the Union it is able to nullify and override the constitution. To violate statute law is bad enough; but this defiance of constitutional provisions exhibits the railway power as endangering the rule of the people and threatening to make corporate dictation supreme. In the twelve states whose constitutions forbid discriminations it is safe to say that the prohibition is secretly violated every day in the year. In the nine states in which pooling is forbidden, the constitutions have been openly defied for the last six years. In the five states in which rebates and drawbacks are prohibited, and the same number in which the short and long haul discrimination is forbidden, these constitutional and statutory provisions are simply ignored by railway magnates who are stronger than the constitutions and the law. Who can fail to see the danger to popular institutions and the decay of representative government when, under the influence of the railways, the legislators elected by the people refuse to pass laws directly required by the constitution, and necessary for the enforcement of the fundamental law? Yet last winter a law which would have merely put into effect the language of the constitution was defeated in Pennsylvania by subservient representatives of the people, under orders from a great railway corporation.

It is upon the principles laid down by the courts

and set forth in the state constitutions, that the railways of the country have been created. These principles alone justify the charters and sustain the exercise in their behalf of the sovereign power of eminent domain. Their public obligations and their subordination to governmental control are conditions of their legal existence. In view of the acts which brought the railways into being, there is no more doubt of the right of the state to impose all needful regulations upon them, to secure impartiality and freedom in their use, than there is of the right of the man who has sold land to collect the stipulated price from the buyer. To sum up, the railway is created by law to fulfil a public purpose—that of affording improved transportation on equal terms to all persons whom it can serve. Whatever is necessary for the honest and impartial discharge of that one function it has a right to do. It can make such charges as will yield it a profit on the investment of its capital; but it must distribute the burden of its charges evenly among all its patrons in proportion to the service rendered. It is designed to overcome the obstacle of distance; but it should overcome that obstacle for the benefit of all, and it is not within its objects to bring one locality nearer to market than another and to make the latter support it in doing so. It is a public servant, not a public tyrant which can enrich and magnify its favorites at the general expense. It may own and control a franchise in its tracks and rights of way, but it has no right to control legislatures or to compel courts and public officers to do its bidding. It is not a commercial providence to exalt one vessel to honor and condemn another to dishonor. It is not a political guild

to sway by its capital, its commercial power, and the work of its employees the business of the people. It is not a modern baron with supreme power over the property and prosperity of its subjects. It is not endowed by the state with the power to rule the business of the nation, dictating in what manner or over what routes the people shall carry on their commerce, or the amount of business that they shall transact. A creature of the state, it must not become a conspirator against commerce, either by building up monopolies for its favorites, or by organizing them for its own profit.

## CHAPTER V.

### PUBLIC OBLIGATIONS AND CORPORATE PRACTICES.

"THE RAILWAY QUESTION," as a subject of popular agitation, grows out of the disregard and defiance by the railways of their public obligations, defined in the preceding chapter, in the practices described in earlier chapters. Many of these practices appear to be excusable and, indeed, necessary, if the railways are to be governed by no consideration but profit to themselves. In defending them, their advocates assume that these corporations are merely business enterprises, organized to make money for the owners. But even on this ground the defence is but partial and imperfect. Leaving out of sight, for the moment, the public character of the roads, it may be proved that many of their current practices are unwise in the lowest business sense, being at war with their own pecuniary interests. Every business intended to supply a general social want is most effectually built up by affording the best and most extensive service possible, at the lowest charge consistent with a fair profit. But this is eminently true of a corporation whose charter is perpetual, and whose operations are forever linked with the prosperity and activity of the community it serves. If its managers are incapable of any higher sense of duty than faithfulness to the trust they hold for their stockholders, it is still true that they are bound to seek the public

favor, to make it the undeviating and conspicuous rule of their management, that every customer alike shall get from them the best bargain they can afford to give, and to aim to build up in trade and prosperity the communities along their own line, rather than those far beyond it. Every great mercantile business in the country has been built up by seeking earnestly to offer the best service equally to all, by fixed prices, small profits, and careful study of the public wants. Shall the permanent prosperity of a railway be furthered by the opposite plan? By violent and arbitrary discriminations? By imposing the heaviest possible burden on the general public, while acting with lavish extravagance in meeting open competition or in distributing secret favors?

While recognizing the fact that the highest interests of the railways, viewed simply as corporations conducted for profit, are opposed to many practices common in their management, it must not be forgotten that there are much higher and more imperative restrictions upon inequality in their dealings with commerce. Railways are constituted to make money; but they are constituted to make money consistently with the public welfare. As against public rights, corporate interests must always be subordinate. The conflict between the money-making function of the railway and its public obligations is often more apparent than real; but in many cases the question arises, Which shall prevail? The general tendency of railway practice, as we have seen in the preceding pages, has assumed that when the securing of net earnings for the railways conflicts with public justice, justice must go to the wall. But no such assumption can be permitted in a public in-



quiry into the principles which should govern the operation of the railway. Broadly defining the privileges of the railways, it may be said that they should have all the powers necessary for the profitable prosecution of their business, consistently with the public welfare. Any practices may be allowed which are necessary for profitable transportation, if they do not work any material damage to one class of shippers or confer unfair advantages upon another. But where public justice and private profit conflict, the latter must be compelled to give way. The extreme powers of government employed in the establishment of the railway system were not put forth in order to make the earning of dividends more important than the obligations of justice and equity upon the public highways. To argue that the profits of capital can justify the imposition of unequal burdens upon commerce, is simply reviving, in another form, the aristocratic idea that the aggrandisement of a class can be made the purpose of government to the detriment of the general welfare.

Both the best interests of the railways as business enterprises and their obligations as creatures and agents of government are involved in a question made prominent in the congressional debates last winter, whether it is proper for railways to charge more for a short haul than for a long one. On its face it is plain that no railway can profitably carry freight a thousand miles at the same or a less rate than is reasonable for the same freight for half the distance; yet it was earnestly contended on the floor of Congress that to prohibit the practice would inflict hardship upon the railways, without any benefit to shippers. Now it may happen, in a particular and exceptional case, that it is better for a

railway to take less for a long haul than the rate which would be profitable on a shorter one. If a railway has empty cars at a competitive point from which freight can be taken, provided the railway makes as cheap rates as the competing route, it may be more profitable to accept the freight at a reduced rate than to let the cars stand idle or to haul them back empty. But even in such an exceptional instance the reduced rates ought at least to earn operating expenses and contribute something to the fixed charges of the road. These limitations are utterly disregarded in the practice of the roads, and were generally ignored by the congressional defenders of the discrimination.

Two notable instances of this class have been prominent in the discussion, the Mattoon and Kankakee case before the Illinois Railroad Commission, and the Winona and Memphis cotton rate in the House of Representatives. They are extreme types of innumerable inequalities between local and through tariffs. They were defended by the same plea. The rate of \$3.25 from Winona was said to yield no more than a fair return on the expenses and capital. But at Memphis the question is whether the railway shall take the freight at \$1 for nearly twice as long a haul, or lose it altogether, and it was reiterated on the floor of Congress, as it has been elsewhere, that, to use the language of Mr. Stewart, "if the railway makes a small profit by taking this cotton from Memphis, it is for the benefit, not only of the railway, but of the local shipper, because it enables the railway, under those circumstances, to give better terms to the local shipper." If the railway makes a small profit! That is where the gist of the question lies. If the railway does not make a small

profit at such a rate it is plainly imposing the cost of the freight upon the local shippers or the stockholders. But if it does make a small profit on hauling cotton at \$1 a bale for 450 miles, what profit does it make by hauling it at \$3.25 a bale for 275 miles, a charge per mile more than five times as great? The same question was presented with numerous other illustrations. The competition of the railways from New Orleans to New York with the coastwise carriers, it was said, puts the through rate from one point to the other at 76 cents, while from Atlanta to New York the rate is \$1. "Has the Atlanta man any reason to complain if the railway imposes only a reasonable charge for the service rendered him?" asked the same gentleman who undertook the defense of the Winona and Memphis absurdity.

These arguments always raise as the first question, What constitutes a fair, reasonable rate? It has even been earnestly urged that the charges of the railways are always fair and reasonable, and that this is proved by their constant reduction of rates for the last twenty years.\* Further, the president of the Illinois Central

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\* It is amusing to see the confidence with which this general reduction of the cost of transportation is sometimes cited as proving the magnanimous generosity of particular corporations. Thus the fact that the average rate of freight per ton-mile on the main line of the Pennsylvania Railroad has fallen from 2.665 cents, in 1865, to 0.817 cent, in 1882, has been widely trumpeted, accompanied by a table showing how vast an income the railroad company has surrendered to its patrons; that is to say, how much greater its income would be, if it collected on the business of 1882 the rates of 1865. The difference for the one year 1882 is \$53,213,949.11; and the "reduction" for eighteen years amounts to \$318,947,486,261. This is an astonishing instance of giving away what the giver never owned or possessed. The fact is kept out of sight that the business of 1882 is the result of the progressive reduction of rates for many years; and could never have existed but for the reductions. The

road, in his defence of the Mattoon and Kankakee case, made a plausible plea for the reasonableness of his Kankakee rate of 16 cents for 56 miles, because it was the rate fixed by the Illinois railroad commissioners. But this avoids the point at issue; which is simply whether that rate can be reasonable when the same freight is carried over the same line to Mattoon, a distance of 172 miles, for 10 cents. Relatively to rates which had previously prevailed it was doubtless quite reasonable. The cost of woollen goods has also decreased very much since 1865. A suit of clothes can probably be bought for \$50 which would have cost \$100 at war prices. In view of this fact, the lower price seems fair and reasonable; but if the reader should buy such a suit at \$50, and should learn that the tailor had sold exactly such a suit to his next customer at \$10, he would be sure that he had been cheated. If, moreover, under the operation of our laws the tailor had obtained the exclusive control of the business of supplying clothing in central New York, and should establish the price of \$50 for such a suit of clothing in Syracuse as he sold for \$10 in Rochester, no argument concerning the fair and reasonable rates given to Syracuse and the necessity of meeting competi-

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company increased its business from 420,000,000 ton-miles in 1865 to 2,879,000,000 ton-miles in 1882; and its revenue from freights increased from \$11,193,000 in 1865 to \$23,621,430 in 1882. But it is certain that this business would have been merely nominal, and this vast revenue would have been utterly lost, had the company maintained the rates of 1865, and refused to meet the public demand for lower freights, made reasonable by improvements in machinery and method. The railways as well as the country at large have greatly profited by the steady decrease in the cost of transportation for many years; but the fact has no value as a proof of reasonableness or equity in the adjustment of rates by the managers.



tion at Rochester would convince the Syracusans that the clothing business did not call for radical reform. And the Syracusans would be entirely right. How can such arguments influence an intellect able to put two and two together? For while the rate of 16 cents for hauling one hundred pounds of freight 56 miles may be reasonable enough in itself, it stands side by side with the rate of 10 cents for hauling the same goods 172 miles. If one rate is fair, what must the other be?

The defence of the discrimination between long and short hauls, or, to define it by its real cause, between competitive and non-competitive traffic, is founded on the claim that the cost of interest and dividends on capital need not be borne by all freights alike. "The road charges very little profit on the New Orleans cotton from Memphis," said Mr. Fink before the Senate Committee in 1883, "they charge nothing perhaps for the use of the investment in the road; but on the bale of cotton they carry from Winona to New Orleans they must charge for the investment made in the road, because the road was built for the Winona and not for the Memphis people." What authority had Mr. Fink for this statement? If it is so, the road seems to have gone woefully astray from its original intention. So far as the cotton question is concerned, the road, if built for the benefit of Winona, should have stopped at that place and given its exclusive attention to the transportation interests of that town. But instead of that it constructs 175 miles of additional track to Memphis, by which cotton is hauled at rates which give it an advantage of \$2.25 per ton in the New Orleans market over the cotton of the Winona shippers. This rate



confessedly pays little or no return to the capital invested in the 175 miles of road from Winona to Memphis, and the deficiency must be made up by imposing charges on the Winona people, proportionately five and a half times as large. It is evident, then, that whatever may be said of the road from Winona to New Orleans, the other portion was decidedly not built for the benefit of Winona, but for the benefit of Memphis at the expense of Winona.

In defence of the discriminations in favor of competitive freight in Congress last winter, it was strenuously denied that local freight is compelled to bear the burden of low charges on through freight. The authority of Mr. Alexander, a prominent Southern railway official, was quoted by several Congressmen, to the effect that no railway had ever raised its local charges to meet the loss caused by lowering its through rates. Supposing this to be a correct statement of fact, it is misleading, as an attempt to show that no burden is placed upon the local shippers. It ignores the burden that is placed upon them by the superior opportunities given to their competitors in exactly the same line of business; and the equally significant fact that it practically raises their rates by confining the general reduction of freight charges to competitive traffic. When railway rates have been reduced fifty per cent. on through traffic within the last ten years, and local rates have virtually remained unchanged, the burden of the local shippers has been practically doubled, no matter what sophistry may be used to conceal the fact.

Under the present system of management it must be admitted that the railway officers are often under practical compulsion to accept freight, at competitive

points, at charges lower than those paid by local traffic. The cars, perhaps, are on hand; employment is offered for them at low rates, and if it is not accepted they may be left indefinitely without employment. If it appears that the rate which can be obtained will more than pay actual operating expenses, it is hardly possible for the manager to avoid accepting it. The smallest contribution of the business to the fixed charges of the line seems to him better than no earnings. But even this consideration cannot apply to such abnormal and absurd discrepancies in rates as some of those we have described. For example, the working expenses of railways in the United States are, upon the average, 65.21 per cent. of the gross earnings. It is substantially within the margin of 34.79 per cent. of the gross earnings, then, representing the entire net earnings of the road, that a variation of rates, between points approximately equal in distance, might be made without incurring actual and direct loss by each single transaction. It is true that some of the expenses included in this computation may not be connected with the transportation of freight, and the percentage of net earnings on freight may be somewhat larger than on the aggregate business. On the other hand, there is no real advantage in taking the freight at all, if the whole margin of profit is taken off. If a very small advantage may be accepted, when no consideration but the profit of the railway is regarded, it may be conceded, for example, that it is better to take freight to New York from Chicago at a rate one third less than the charge from a point fifty miles east of Chicago. A rate of 20 cents per hundred for 850 miles may yield something to the road, when a rate of 30 cents for 800 miles would not

yield more than a fair profit upon the capital. But between this instance and the wide discrimination we have discussed there is no analogy. Mr. Horr urges that, if the railways cannot earn 6 per cent., they should be allowed to earn 2 per cent.\* But if the average net earnings of the railways amount to 6 per cent. upon their capital stock and debt, it follows that, to earn 2 per cent., they must have a revenue equal to the present average expenses of operation, and one third of the present net profits besides; that is, of 76.80 per cent. of their present earnings. In other words, the reasoning of Mr. Horr, if altogether valid, would authorize a railway to accept through freight at rates not less than 76.80 per cent. of its charges on local freight for the same distance, in order to earn 2 per cent. on one and 6 per cent. on the other, or to charge a rate from a competitive point equal to that which it would charge to a non-competitive point involving only three quarters of the service. This has no application to eccentricities of management in which one rate is from three to five times as great as another, proportionately to the distance. If the Memphis rate on cotton yields 2 per cent. interest, the Winona rate must yield 24 per cent. The difference between a rate which pays 2 per cent. on the investment and one which pays 6 or even 10 per cent. will never account for such discrepancies as making twice the charge for half the distance.

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\* "Suppose, in addition to doing their local business, they can carry a portion of this through traffic, and can get it on a basis of paying only 2 per cent. on their investment instead of 6, ought they not to be permitted to do this extra work? Most clearly they should be."—*Mr. Horr's Speech, Congressional Record, 48th Congress, second session, p. 167.*

But in cases to which the argument of Mr. Horr really applies, as in some other classes of discrimination, it is clear that the fault lies, not with the men who make the rates, but with the system under which they are obliged to act. But the evil must none the less be removed. The requirement that rates shall be uniform to all shippers grows out of the public character of the railways, and cannot be laid aside or ignored without injury to the public interest. Consider the analogy between rates imposed by railways and taxes imposed by municipal corporations, both creatures of the state. Large property-owners and corporations doing an immense business within the city of New York are said to evade municipal taxation by locating their residences and offices outside of the city limits. Suppose that the municipal authorities of New York should invite such corporations and millionaires to return, upon the agreement that they shall pay one fifth or one sixth of the rate assessed on the tax-payers at large. Would not such a proposition raise a storm among the general tax-payers, to which the complaints against the railways would be a mere zephyr? The public mind would insist that in taxation rates must be equal; that it would be better to lose much revenue than to establish a class favored by a lower rate of taxation than that assessed on the general public; and that the city must not reward the removal of property to escape taxation. I do not claim that the circumstances and obligations in the two cases are identical. But the railway corporation and the municipal corporation are alike creatures of the state and derive their powers from legislation; the freight rates are greater in proportion to the profits of business than the tax



rates ; and, in both, the public necessity for practical equality is imperative.

This subject cannot be dismissed without an avowal of the belief that the practice of giving shippers who have the ability to select a competing route marked advantages in rates over those whose freight is wholly within the control of the railway is, in its permanent effect, injurious to the railway itself. We have recognized and conceded the powerful inducements which often compel railway managers to adopt this policy. But while the temporary influences may be irresistible, the permanent effect, like that of discounting future receipts at high rates, is costly and often ruinous. The present methods and constitution of the railway business may compel it ; but, if so, they are vicious and require reformation. The true interests of a railway are best promoted by building up the business of the country along its tracks, and are injured by offering a premium on the growth of business in sections beyond its lines. In the end, the towns and farming country lying along any railway must furnish its main strength and support. In fact, the roads not only depend upon local business for their support, but often draw from it the means of competing for through freight at less than cost. They thus offer a bribe to capital and enterprise to go somewhere else than on their lines, and strike at the very root of their own future and permanent prosperity. In justification of the wide inequalities of rates between local and competitive business, a vague effort is made to establish, as a general rule, that the business which is unaffected by competition may properly be made to pay fixed charges and dividends, leaving all competitive business to be taken at



any rate which will pay the cost of transportation, with a possible but doubtful margin for profit. Neither in the interest of public justice, nor in that of the railway itself, can it be accepted as a rule that the shippers whose business is in its exclusive control shall bear all the cost of the investment, while competitive points enjoy the use of the road without sharing that burden. Such a rule would, in effect, throw the entire burden of the enterprise upon one locality for the benefit of another, an indefensible act of government. This rule is imaginary, and produced to suit the exigencies of the railway apologists, rather than adhered to in practice. It is clear enough from statistics that the average rates on through freight from the West to the seaboard do pay fixed charges and a fair return on the capital invested. The largest railway owner in the United States declared, less than two years ago, that a rate of fifteen cents per hundred pounds from Chicago to New York afforded profitable business to his system of roads. Whether this was exact or not, an average charge of twenty cents from Chicago to New York is so profitable that it is almost impossible to keep the rival railways from cutting under it to secure business. This fact exposes the practice of making a charge proportionately from two to five times as large on local business in a strong and unenviable light. The vast majority of such inequalities in rates are unmistakably the excesses of arbitrary power in a territory where its rule is absolute; and the burdens imposed by such a power, where it has full control, and those borne where it is restrained by competition, stand in the strongest possible contrast, when we compare the rates accepted by the railways on competitive freights

and those which they impose on shippers who are wholly at their mercy. The inequalities heretofore discussed show that a thorough reform is needed in railway management; and the fact that these practices are defended by representatives of the leading railway organizations proves that this reform must come from a power outside of those which at present control the railways, and superior to them.

It has been sufficiently shown that when discriminations in rates are made between particular sections, localities, or interests, in the regular course of business, and even when they seem to be forced upon the railways by competition, they work gross injustice and amount to a public wrong. But in this discussion it has been assumed that the management of the railway is simply a business management, seeking the success of the corporation as a business enterprise. Even these evils, thus originated, are trifling compared with those which arise when the interests of the managers are more or less distinct from those of their company. And this is often the case; how often the public will never know. If the railways are to have the power to make discriminations which seriously affect the profits of trade, there is not and cannot be any certainty that the power will not be used to build up a firm, an industry, even a city or district, in which the managers or their friends have pecuniary interests, at the expense, or even ruin, of their competitors. By open discriminations, or by secret rates, drawbacks, and rebates, a few railway managers may subject to their will every business in which transportation is a large element of cost, as absolutely as any Oriental despot ever controlled the property of his subjects. No civilized community

has ever known a body of rulers with such power to distribute at pleasure, among its mercantile classes, prosperity or adversity, wealth or ruin. That this is no abstract or remote danger to society is plain to any man who will look at the condition of trade and of mercantile morals in the United States to-day. In the most important branches of business, engrossing much of the daily activity and productive energies of the nation; in the manufacture of iron and steel, the conveyance and marketing of stone, brick, grain, lumber, coal, petroleum, live-stock, and all kinds of meats, the cost of transportation is so large an element in the final price to the consumer that a material difference in that cost commonly represents far more than the entire average profits of the shipper. The result is that men who can secure discriminations in their favor from the railways can defy competition, can override advantages of locality, of superior skill, of foresight and enterprise, and can accumulate unearned wealth, to be divided, if they will, with the agents of the corporations which are thus made conspirators with them to plunder the community. True, there are checks upon such conspiracies. The competition of water routes, and that between the railways themselves, together with such forbearance on the part of managers as conscience or law and public opinion may dictate, have in many cases set limits to the evil. But it is, nevertheless, the case to-day, recognized more or less completely in all these branches of industry, that the surest way to commercial success is to obtain, by fair means or foul, a close alliance of friendship, favor, or interest with some influential railway official. Such a state of affairs is radically irreconcilable with a healthy and natural condi-

tion of the commercial interests affected. In the first place it is destructive of the democracy of commerce, which extends the right of manufacturing or distributing merchandise to all who wish to engage in it. Let railway favors secure to particular firms in prosperous times the greater share of the profits of any business, and in unprosperous years all that can be gained, and the result must eventually be to consolidate that business in the hands of a favored few. Those who cannot obtain such favors must choose whether they will withdraw at once from the ruinous struggle, or continue it until gradual decay forces them out. Not only can the great enterprises in which profits are determined directly by railway rates be brought into dependence and subserviency by this policy of discrimination, but through these the retail merchants and jobbers in the same line of trade. If any one thinks this is a fancy picture of the tyranny which can be exercised over trade by individual discriminations, let him study how, in the anthracite coal trade, in which every mining firm's existence is dependent on the toleration of the transportation companies, they extend their partiality and discrimination to all the retail coal yards dependent on them for supplies. The result of corrupting the fountain head is inevitably to taint the stream which flows from it. Place the fundamental enterprises of commerce under the rule of favoritism, and the same evil qualities will extend throughout all the branches of trade drawing their supplies from these sources.

While the concentration of the wealth and resources of only one or two branches of trade in the hands of the railway plutocracy has been complete, the effect of such discriminations, even upon commercial interests



in which their agency is limited, is opposed to healthy business independence and to pure business morals. The man who brings capital, ability, and energy to the prosecution of any important shipping or manufacturing trade, finds that these are not the qualities which most surely command success. Knowledge of the markets, frugality, and unremitting work avail nothing against a rival who, by favor of the railway, secures an advantage of five or ten per cent. on the price of his commodities in the cost of transportation. This evil, too, works insidiously, and rarely comes to light until great injustice is effected. Is it strange that those who find their legitimate business disappearing through unseen influences, which baffle all their exertions, should turn to reckless speculation as a last hope of restoring their fortunes? Or is it inexplicable that, when the prosperity which merchants have built up by years of toil, integrity, and skill is sapped and ruined by the secret favoritism of an irresponsible power, they should revenge themselves on the social system which permits such depredations by fraudulent transactions, dishonest bankruptcies, or mammoth defalcations? No better explanation of the decay of commercial morals is needed than the rise of a power which deals out commercial success by favoritism or selfishness, and nullifies the efforts of honest, independent, and conservative trade to obtain a competence.

Finally, the worst effect of this obnoxious practice is that it destroys the individual independence and self-respect of its victims. Give to any man or set of men power to award at pleasure prosperity or adversity, and a premium is placed upon sycophancy and corruption. A man whose resources depend on rates of



transportation will naturally be slow to provoke the enmity or opposition of railway managers who, by a rate unfavorable to him, or a secret rebate to his rivals, can condemn his business to slow but certain decay. Men who see that wealth and prosperity can be gained by conciliating the favor and serving the purposes of those who hold the fiat of fortune in their hands are urgently tempted to subserviency and time-serving. It will appear elsewhere that the greatest protection to the railways in such unjust practices is the fear of provoking their enmity by appealing to the law against them. Nothing could more strongly tend to destroy individual independence and personal self-respect in the commercial community than the power, held by every railway manager, by manipulating rates, to give rich rewards to his friends and to serve out pecuniary punishment to all who oppose his plans or incur his enmity.

No one now denies the injustice or danger of the exercise of this power, yet railway advocates plead against a legal prohibition of such discriminations, arguing that the power to make them is necessary in competing for the business of the large shippers. The highest estimate of their importance in legitimate railway management would not justify the continuance of powers which may be used for the purpose of favoritism between shippers. Concede the utmost advantage that any railway can hope to obtain by favoring large shippers rather than small ones, and it has no weight against the fundamental public right to equality in the action of railway rates upon commerce. Concede in the highest degree the convenience of rebates or drawbacks in the transaction of railway business, yet this

consideration is insignificant beside the imperative public necessity of preventing the discrimination and favoritism which rebates and drawbacks at once facilitate and conceal. In fact, the importance of these methods in legitimate railway operations is greatly overstated. They have been made prominent in the defensive pleas of the railways, in order to divert attention from the breaches of public justice and equity with which they are practically associated.

Much is made of the claim that the railways must, for their own interest, give large shippers lower rates than small ones. Within very narrow limits this is true. The shipper who forwards a single package of freight has no equitable claim to proportionate rates with the one who does his freighting by the car or train-load. The cost of the service is greater. But the application of the rule is limited by the nature of railway transportation. For wholesale shippers, the cost and value of the service are directly proportionate to the number of car-loads of freight transported for each. Further, in any industry the largest output, and, consequently, the largest freight shipments, will be secured by giving all competitors equal freedom to reach the market. It costs the railways no more to haul ten car-loads of freight for ten shippers than to haul them for one; while the true interests of the railways, as well as of the public, require free competition, under which all shippers have equal facilities.

Under certain imaginable circumstances, indeed, there may be an appreciable difference in the cost of service between transporting a large number of cars for one shipper and the same number for several shippers. But this is rarely any ground for discrimination, since,

when competing shippers require such service, the conditions are practically the same. One furnace or rolling-mill may have twenty car-loads of coal hauled a short distance daily, where two others want but ten each, but in such a case the difference of cost is not material. On the long hauls, where important discriminations have mainly been enforced, the difference in the cost of service to large and small shippers is inappreciable. There is the same slight difference in the cost of making up trains; but it is an infinitesimal part of the total charges. It would cost the railway a little more to collect thirty car-loads of refined petroleum from a half dozen refineries at Cleveland than to take the whole number from the Standard yards; but on the total charges for transporting that freight to New York or Philadelphia, the extra cost cannot make an appreciable difference. In all such cases, too, it is easily perceived that a greater quantity of freight will be moved if the shipper of a few cars is placed on an equality with the shipper of many. The result of the discrimination in favor of the Standard Oil Company proves that the concentration of the business in the hands of one great establishment restricts its aggregate volume. The irony of the plea in its defence is exposed when we remember that, while the railways justified the discriminations on the ground that they must favor the largest shipper, the real reason why the competing refineries could not make equally large shipments was that the railways would not give them equal rates. It were as reasonable to blindfold a man and then refuse to take off the bandage because he shows no evidence of possessing eyesight. As a practically universal rule the difference in the cost of ser-

vice between handling a number of cars for various shippers and handling the same number for one shipper is too slight to be considered as an element in the question of rates. In wholesale shipments the car-load is the unit. Shipments smaller than the car-load call for extra services, and a higher rate should be charged upon them. On all large shipments, from one car-load to any number, the rate should be uniform per car-load.

The grant of a rebate or drawback on the freight payments of any shipper can have no object but to conceal the amount of the discrimination in his favor. Under this practice the freight of the favorite shipper is charged on the manifests and books of the railway at the regular tariff rates. The agents and clerks who receive and forward the freight, and those who deliver and collect the freight charges, have no record showing a lower rate to him than to others. The same charges are indeed collected of him at first, but after he has paid a certain amount he recovers the stipulated rebate or drawback, on the presentation of his freight receipts. By this method the official knowledge and record of the advantage given is kept, not only from the public, but from most of the clerks and agents of the company. Practically its only effect is to conceal the transaction, and it is fair to conclude that this is its real purpose. In the recent Congressional debates on this topic the ingenuity of two or three supporters of railway practices was exercised in imagining circumstances which might make this practice necessary. Mr. Rice, of Massachusetts, made the discovery that one shipper might find another underselling him by the aid of "secret lower rates," a case, certainly, not very



uncommon; and, as a remedy, he wished the right preserved to the railways to grant a rebate to the first shipper, to make things even. If it were made certain that the rate of rebate would be the same to all shippers, there might be no public objection to it; but the very nature of the practice excludes such equality. If the rebate is the same the additional payments and repayments are useless, and it would be easier to reduce the regular tariff rate. The remedy for the secret rebates, so often practised, is not to set up others to equalize them, but to abolish the practice, and enact that there shall be no "secret lower rates." Another suggestion in the same debate was, that the rebate might be necessary to allow a shipper the rate fixed by the railways for exportation, when he had been charged a higher rate on the freight which was exported; while another was, it might be used to correct the disadvantage which a shipper might be subjected to by lower rates granted to rivals who shipped by other roads, as if a railway could be expected to refund to every shipper alike, after the freight has been carried and the transaction is complete, the excess of its charges over those of a rival. But if such an effort of the imagination had any foundation in fact, its usefulness or fairness would have no bearing on the practice of granting secret drawbacks. The correction of an ascertained or admitted overcharge has nothing to do with this practice. For such refunding of money honestly due the shipper, the vouchers of the company may properly be issued. But to put in the hands of a railway manager the power to grant secret drawbacks on the regular freight charges of a shipper whom he may favor, is as dangerous to commercial



freedom as the old French system of issuing *lettres de cachet* was to personal liberty.

Against every such practice the public interest demands the complete equality of shippers. The favorite argument of railway men, that the public, not understanding the details of railway business, cannot judge of the necessity or usefulness of these practices, simply shows that those who urge it do not understand the question. When they imagine that any pleas of utility or convenience can justify inequalities, they fail to understand the primary and imperative necessity of the equality which must be guaranteed to all persons in railway services. In some respects there may be reason for waiving the public convenience, in order to encourage and develop railway interests. But the demand for equality is fundamental and indefeasible. No convenience in the transaction of railway business, no pecuniary enhancement of the fortunes of managers, can condone the public crime of establishing preferences and favoritism in rates. Any method of transacting business which can be used to cover such preferences, or any argument which can be adduced to support them, embodies an assault on public justice.

Another variety of discrimination which, to some extent, partakes of the nature of individual preferences, has been defended on the same ground as the defence of the discrimination against localities. It is the policy of charging "what the freight will bear." Extreme instances of this practice were earnestly defended on the floor of Congress last winter. No doubt the question what the freight will bear is often an important consideration in railway problems; but this is no justification of the practice of the Central Pacific Rail-

way, which was defended by its Congressional apologists. "If I have a mine yielding ore worth six dollars a ton," asked Mr. Budd, "and my competitor near by has one which yields ore worth forty dollars a ton, am I to be shut out of shipping my ore to market because I cannot afford to pay as high a rate as my rival?" This was said in defence of the Central Pacific Railway, which requires shippers of ore from the Nevada mines to submit assays of their product to the railway managers, and varies its freight charges with the richness of the ore. The reply to this somewhat pathetic inquiry is obvious. If ore is not of enough value to pay a fair freight for carrying it to the reduction works, it is not the duty of the railway to make up for this by carrying it at a loss. If the railway attempts to make charitable compensation to unfortunate mining operators, it must either put the loss on its stockholders or on the miners of good ore. Neither practice is equitable. The railways are not built to rectify the inequalities of fortune, either at the cost of their stockholders or at that of fortunate mine-owners. If the ore is not worth paying a fair freight, we see no other course for the owner of the mine than the somewhat trying one suggested by Mr. Budd, of waiting until nature puts forty-dollar ore into his mine. But this is not the real point at issue. No one has ever accused the Central Pacific Railway of wasting its capital by carrying ore for unlucky mine-owners at less than cost. The character of that corporation makes the fact that it carries low grade ore at a certain rate conclusive evidence that the rate affords a profitable return for the service performed. But if cheap ore can be profitably carried at this rate, all ore can be profit-

ably carried at the same rate; and the higher charge on richer ores is excessive and unjust. The railway exerts its power to grasp part of the profits of the prosperous miner, and the miner submits rather than have his works stopped. In this case the cost of service is disregarded in fixing the freights. Now the inexperienced public may be unable to determine the exact cost of service, but is intelligent enough clearly to see, in the rate fixed on cheaper ores, proof that the high rates on better ores are excessive and extortionate. The railway has no right to appropriate any part of a shipper's good fortune, or superior judgment, or greater industry; and the practice is little else than robbery.

It has already been observed that the question what the freight will bear is, within proper limits, an element in the calculations of managers. If the coal, which lies valueless in some remote mountain of Pennsylvania or West Virginia, will not bear the charges necessary to repay the capital used in constructing a railroad to bring it to market, the road will not be built. If it will bear such rates—that is, if after paying them, the price which the owner gets, when his coal is brought into market, remunerates him for the cost of mining, and leaves him a profit—the building of the railway will benefit both him and its builders. In such calculations the relation between cost of service and what the freight will bear is the essential element which determines whether the enterprise will pay. It is evident, too, that, under different conditions and in different localities, both the burden which the freight must bear and that which it can bear will vary widely. A coal mine which can only be reached by a line in-

volving heavy grades and expensive tunnels must support heavier charges than one which is reached by a level and inexpensive route; while a gold or silver mine can pay a higher rate for securing the advantages of railway transportation than a limestone quarry. But while a railway is perfectly justified in rejecting freight which will not bear charges equal to the cost of service, it has no right to extort excessive rates because the freight is so valuable that its owner can endure them without ruin. Moreover, rates for different shippers and different localities must be uniform on the same class of freight; otherwise the way is open to onerous discriminations which may deprive private enterprise of the just advantages of their thrift or foresight, and the public of the natural cheapness or superiority of their products. Such a course must ultimately be injurious to the railway which adopts it. Perhaps an iron-bound monopoly like the Central Pacific can, for a time, swell its apparent profits by the practice, but in the end the result must be, as we have seen it to be in the long-and-short-haul abuse, to discourage the growth of the business which has to take all the burden it can bear, and on which the permanent prosperity of the railway depends, and to encourage that the rates on which are beyond its control. The worst feature of the practice, however, is that it opens the way and serves as a cloak to arbitrary personal discriminations between shippers, the most utterly vicious and indefensible of railway abuses.

Another practice which is almost universal among railways is the attempt to control, by discriminating rates, the disposition of freight beyond the line of the company; or, what is identical in principle, although



different in application, making the charges on a certain class of freight the means of dictating to the shipper in what manner he shall dispose of other freights in his business. Of this abuse, too, the Central Pacific Railway practises the most extreme form in its notorious special-contract system. By these contracts the railway agrees to give a shipper a large reduction from regular rates, on condition that he shall ship all freight by the railway, using ocean transportation for no part of his business. The railway doubtless secures by this means a large share of the freight business which would otherwise seek the more economical but less rapid carriage by sea; and this use of its power over that portion of the merchant's freight which has of necessity to be carried by railway probably results in the enhancement of its profits. But it is to be noted that this makes no difference in the cost or profits of the service rendered in any particular instance. The railway can haul a car-load of groceries just as cheaply for a merchant who has brought a ship-load of some other merchandise to San Francisco by water as for one who has not. The service, cost, and profit to the railway are identical in both instances, but, by a difference in the charges, the Central Pacific Company imposes a virtual prohibition upon all merchants to whom its service is essential on any part of their business, from using the water route on such shipments as it may be for their advantage to have transported in that way. Practically the same position was shown to be taken, in the suit against the Lake Shore and Michigan Southern Railroad, arising out of discriminations in favor of the Standard Oil Company. The officers of the railway, on the witness stand, admitted that the



discriminations had been persistently and permanently imposed, and justified them on the plea that the Standard gave the road all its business. Other considerations were presented, such as the largest shipper plea; but the essential claim of the railway officials was that an agreement on the part of the shipper to send all his freight over a railroad justifies the road in giving that shipper a large advantage over another requiring exactly the same service. In other words, they recognize the obligation to charge equal rates to all shippers only so long as it is convenient to do so. They will charge equal rates if nothing offers them any inducement to do otherwise; but if any future or hypothetical advantage is to be gained they will make rates to reward the shipper who obeys their wishes on matters independent of the transaction in question, or to punish one who does not. The practical operation of this discrimination is as truly an imposition upon the public as its theory is an infraction of the equitable obligations of the railways. Its result is evident in the Central Pacific case. The merchant must either pay expensive railway charges on that class of merchandise which is susceptible of cheap transportation by water, or he must abandon that part of his trade to which the services of the railway are essential. Such dictation as to the routes of general business is not to be tolerated in the public interest. It is the right of trade to use all the different routes best adapted to the economical carriage of its respective classes of merchandise. It is a public right that articles for general consumption shall be brought to consumers by the least costly methods. Any manipulation of railway rates which increases the cost of a great staple to the consumer is an invasion

of popular rights. Any dictation to commerce as to the routes by which it shall transport its goods is an assault upon the liberty of trade.

The same principle—of making the pecuniary interest of the company superior to its obligation of impartiality—affords the foundation for the custom of making special rates on freight coming off or going to particular connecting lines, so as to compel the freight to take these routes. This is almost universally practised in the movement of through freights to and from the East and West. For instance, the Pennsylvania Railroad transports from Pittsburgh to the seaboard a large amount of grain, which comes to it from the Pittsburgh, Fort Wayne, and Chicago road, and for which it receives a certain share of the through rate made on the shipment at Chicago. Suppose its share of the rate to be  $12\frac{1}{2}$  cents per hundred pounds; indicating that  $12\frac{1}{2}$  cents per hundred pounds is a reasonable rate for hauling grain in large quantities over its line, when the freight is delivered at its terminus already loaded in cars, and ready for shipment. Under its obligation to give, to all shippers alike, the same rate for the same service, any one else who can offer grain at Pittsburgh, already loaded in cars, is entitled to the same rates. Suppose that the grain was brought to Pittsburgh by river, would the shipper get it carried thence to Philadelphia or New York for the same charge that is made for exactly the same service on freight coming from the connecting lines of the Pennsylvania Railroad? It is very well known that he would not. The Pennsylvania Railroad has established, by its rates, an effective veto on the shipment of freight from the river points to the East by any other than the all-rail route; and shippers hav-

ing freight which could be carried advantageously by river, and thence by rail over the Pennsylvania Railroad, if charged the same rate others obtain on exactly the same service, cannot utilize that cheap and natural highway of commerce. The same rule, varied according to circumstances, is in force on every railway doing a through business. By universal custom the railways assert the right to dictate how the freight shall be brought to their lines, and even what shall be done with it after transportation. Thus the Pittsburgh, Fort Wayne, and Chicago Railway brings two car-loads of flour to its terminus in Pittsburgh. If one car-load is to be shipped to Philadelphia, over the Pennsylvania Railroad, it pays a certain fixed rate; if the other car-load stops in Pittsburgh, it is charged another rate, materially greater. What right has the Fort Wayne road to enact that the consumers of Pittsburgh shall pay a higher rate on their flour as a penalty for not affording business to another road? What right has any road to assume the prerogative of dictating where or how the freight which it carries for the public shall be disposed of?

In these cases, advantages are given in rates to the freights of connecting lines, because the Pennsylvania Railroad has a controlling interest in the stock of the other corporations. It is for its pecuniary advantage that freight coming to its line, or going from it, shall furnish business to its Western roads. But that pecuniary advantage does not accrue to it in its character as a transportation agency between Pittsburgh and Philadelphia, but in its character as an investor in the stock of other roads. It is not as a railroad company, but as a stock-owning corporation, that it favors these roads.

The confusion of these functions is of doubtful character and may easily lead to dangerous practices. We have seen in the illustration how it may lead, and in fact has led, to the almost total disuse of the facilities for transportation offered by the Ohio and the Mississippi rivers between the East and West. But what is there to prevent the same practice being carried to still greater lengths? If a railway company may invest in the stock of another railway and declare that freight coming from the line of the latter shall be carried at rates which practically prohibit through freight from other sources, why may it not extend the same discrimination to other classes of business? Why may it not take a partnership in immense coal fields, for instance, and establish rates which send the operators of other coal mines into insolvency? There is no legal justification for the dictation to shippers by one railroad that their freight must pay tribute to another road. Such practices are destructive of the independence of trade, and their sole purpose is either to uphold a monopoly in transportation, or, as was illustrated in the oil business, to build up a monopoly in the business affected. No plea of profit on investments, which one company may have made in the shares of another, can excuse such a distinct attack on the right of every man to obtain the materials of his business where he chooses, and to sell his products where he can find the best market.

It is customary to defend this practice by the plea that, to move freight for the long distances, it is necessary for the different lines of railway to share a rate, which, divided between the lines over which it passes, affords a comparatively small rate to each. The answer to such an argument is very evident. There is not the



slightest objection, from the public standpoint, to making cheap pro-rata charges, so long as they are equal to all. But in fact the practice does not favor the cheap transportation of freight for long distances. It is not conducive to the cheap movement of the crops that the advantage of the pro-rata charge should be restricted to certain especially favored lines. The favoring of one or two lines is what is objected to, and that preference restricts, instead of aiding, the shipment of through freight. It is demonstrable that the grain raised along the banks of the Missouri could be transported to the seaboard, by the Missouri, Mississippi, and Ohio rivers to the upper ports of the latter river, and thence by rail to Baltimore and Philadelphia, at a marked economy over the all-rail route, if the roads whose main lines run from that river to the Eastern cities would make, on such shipments, the same rates they give on the same service when the grain reaches them by connecting lines. They would be paid exactly the same rate for exactly the same service, and the increased volume of traffic would largely increase their revenues on their main lines. But this practice, which is defended as affording cheap transportation to the West, operates as a bar to the use of the water route for a portion of the distance. It is a fundamental obligation of the railways not to discriminate against freight which comes to it from one route, because its officers or its investments are benefited by the earnings of some third road. The New York Central has no right to give freight from the Lake Shore a better rate than freight from the lake, on account of the Vanderbilt investments in the Lake Shore; nor has the Lake Shore the right to give better rates to the New York



Central freight than to that offered it by the Erie, because the Vanderbilt investments are large in the New York Central. The only safe rule is that laid down twenty years ago by Judge Strong, and recently repeated by the Circuit Court of the United States, in a case in which exactly this question arose between two roads in Colorado. It is that every railroad is bound to give the same rate to similar freight offered under similar conditions, irrespective of the question whether or not the freight comes to it from a route to which it is friendly. The business of the railway is to transport the freight offered to it, giving equal rates to all for the same service, and it is most emphatically none of the railway's business what is done with the freight before coming to its line or after leaving it.

In the discussion of the various inequalities of the railway tariffs, in the preceding pages, it has been recognized that it is impossible to fix any exact rule for determining the equitable charges for each of the infinite variety of services which the railroads are called upon to perform. Such a task would be hopeless, whether attempted by critics of the railways or by legislation. No iron-bound rule can be established to govern the inexhaustible multiplicity of the various conditions which they must meet. But the general principles of equity and justice which should govern all their operations are clearly defined by the law, and are evident from the natural requirements of public rights. These principles furnish rules which are universal and meet all cases. The general principles which should be respected in the operations of the railways are stated in the first two rules given below, from which the succeeding ones may be regarded as deductions:

1. The public character of the railways requires practical equality in the services of each to all who employ them. No discrimination in rates or preference in the despatch of freights is consistent with that character.

2. The business character of the railways forbids any demand that they shall perform services for any part of the public which do not yield them a fair compensation on the capital invested.

3. The equality demanded by the public obligations of the railway consists in making the rates charged to all shippers bear a practically equal proportion to the cost of service performed. To perform a greater service for one shipper or locality, at the same charge made to another for a less service, is as great an inequity as to perform the same service for a less charge.

4. The railway cannot be required by the public interest to make its charges cover full profit on capital invested. In many cases the road is unable to obtain business at such charges, and must accept lower rates. But it is a public wrong for the railway to discard this element in its charges to one shipper or set of shippers, and impose it upon another, so as to inflict a disadvantage or burden upon the latter.

5. Any attempt to secure increased prosperity to any section or locality, by transporting its freights at less charges than yield such a fair compensation to the railways, is a violation of both the preceding rules, and is beyond the proper province of the railways.

6. The claim that has been made for a reduction of railway rates in certain sections, on account of a depression of values in the products of those sections, is not just, unless it can be shown that the existing rates

are in excess of the fair profit to which the railways are entitled. It is not the business of the railways to repair the misfortunes or hardships of any section or interest at the cost of other interests.

7. Distance being an essential element in the cost of service, neither the railways nor the public have a right to disregard it. The people of one locality have no right to ask that they shall be placed on an equality with those of another locality requiring less transportation, and the railways must not bring a point one thousand miles away from market nearer in charges than one two hundred and fifty miles away. As distance is not the only element in the cost of service, the charges cannot be required to be in exact proportion to the number of miles the freight is to be hauled; but it should have due weight in determining the different rates of any railway.

8. The rates of other railways for a given service do not constitute an authoritative criterion for the rates which a certain road may impose. The capital required to construct the road, the power necessary to haul freight over its grades, and the volume of business determining its rates, may be much greater or less in one case than in another. But the rates which a road charges for service to shippers at one point may fairly be taken as an indication of the proper charges on the same class of freight to shippers at another point on the same line.

9. The railroad is chartered solely to afford improved facilities for transportation on its own line, and it should confine itself strictly to that work. To require anything of it outside of the proper performance of that work is foreign to the purpose of its creation,

while its voluntary assumption of powers beyond that function may amount to a gross usurpation. This rule will be found to prohibit several practices to which the railways are prone. Thus :

The railway must not use its power to raise or depress the prices of any commodity over which its transportation may give it influence. It is not within its province to judge between the producer, the consumer, or the middle-man, as to whether prices should be lower or higher.

It must not use its power to regulate the operations of any industry to which it furnishes transportation, or to restrict production, either directly or by supporting combinations for that purpose. Its participation in any plan to create an artificial scarcity of any staple amounts to a conspiracy against the public.

It has no right to exert its corporate influence, or to expend its funds, for the purpose of affecting the action of other railways, either in fixing rates or in other matters which may affect its own business.

It must not assume the work of police or sanitary regulation, by giving preferences to one class of business over another, on the plea that it is preferable in the interest of the public health or the public morals. It has no right to say that it is for the public health that it shall charge twice as much for the transportation of one staple as for another requiring services of equal cost. Such an assumption is wholly beyond its province, and usually serves only as a cloak for wanton discriminations.

It must not exert its corporate influence in political questions or in legislation. The railway has a right to present its side of the case when legislation is pro-

posed which may affect its legitimate interests; but to support its presentation by distributing favors among those who can affect legislation is corrupting and inadmissible.

10. A clear deduction from the rule that the railway must perform equal services at equal rates, and must not seek to extend its power beyond its duty on its own line, is that it has no right to inquire whence freight was obtained, or what is its destination. Its sole business is to transport the freight from the point at which the shipper offers it to the point to which he wishes it transported. To say that if it comes from a certain locality or over a certain route, or is going to a certain locality or route, higher rates will be charged, is an unjustifiable interference with trade, which is nevertheless commonly practised in railway management.

11. The railway has no right to inquire what the shipper will do with other freight than that which he offers for transportation. To declare that if he uses it in a certain trade or manufacture, or that if he transports some of his freight by sea, or gives a portion of his freight business to some rival route, he will be charged higher rates than others is an infraction of commercial liberty.

The limitation of the railways to their single purpose of building and operating public highways for the benefit of commerce, as insisted on in these pages, is a necessary deduction from their public obligations. As long as they confine themselves to the performance of their legitimate functions, they are of inestimable public service, and their existence and establishment should be freely encouraged, their rights and property strictly guarded, and their success duly recognized and



applauded. But if they have in any instances transgressed the just and legal limits of their powers, the transgression must be noted and the public danger recognized. If they have built up private wealth by favoritism, encouraged the growth of monopolies, combined to raise the prices, or artificially to restrict the supplies of any staple, organized combinations to prevent free competition in their own or any other business, conspired against the development of the country by seeking to prevent the building of other routes, or sought to control politics by corrupting voters, legislators, or courts—if they have committed any or all of these transgressions, they have made a dangerous attack upon the public welfare, and demonstrated by their own acts the necessity of a thorough reform. The public experience is sufficient to determine whether there have been such invasions of popular rights. It is not necessary to show that such dangerous practices are universal. One such monopoly as the Standard Oil Company is evidence enough that the railways possess a power inconsistent with the independence of trade. One political and commercial oligarchy like the Central Pacific Railway should convince the nation that the growth of such irresponsible and unscrupulous powers must be made impossible. We need not wait until all enterprise is ruled by railway managers and all wealth distributed among their favorites, before we take action for the maintenance of popular independence in trade as well as in society. The mere fact that the railways can, if they choose, usurp powers so inconsistent with the objects for which they were established and so dangerous to the public interest, makes it necessary to place such powers completely

beyond their reach. What legislation is necessary may be a difficult and yet unsolved problem; but that there is an imperative and urgent necessity for a public remedy which shall not only forbid such distortions of the public character of those corporations, but shall thoroughly and completely eradicate them and make them impossible, no one can doubt who has considered their true bearing and effect.

It is an interesting subject of speculation whether, if such practices are necessary for the successful operation of the railways, any enhancement of the national wealth or development of the material resources of the country could compensate for the domination of business interests by a class of privileged plutocrats, the destruction of commercial freedom, and the deterioration of the mercantile classes into dependants and time-servers of railway magnates. Such a question has little practical bearing, as it is clearly possible to preserve a useful and profitable existence to railway enterprise freed from such abuses. But suppose it were not possible, would the gain of wealth in the nation be any compensation for the decay of popular rights and the degradation of individual character? I think not. The land "where wealth accumulates and men decay" has long been proverbially destined to ultimate disaster. It would be far better for the people, and would secure a stronger and higher national life, to preserve the old methods of life, the slow and restricted operations of commerce, with the frugal but withal independent and self-respecting character of the people, than to gain tenfold the marvellous growth of wealth that has been created by the railway system, and with it place the vast operations of commerce under the rule of an irre-

sponsible oligarchy of corporation magnates, and transform the once independent, upright, national character into subservience or submission, such as either accepts fortune from the favor of its masters or sinks into obscurity or failure on account of their opposition. Better national poverty than national wealth with the people divided into the class which grants prosperity, the class which earns it as servants, and the class which can only express its dissatisfaction by discontented muttering and destructive disorder. If we must choose between railway prosperity combined with the power of these corporations to distribute wealth by discriminations, on the one hand, and national poverty on the other, let us, for the preservation of freedom, justice, and national self-respect, wipe out the railway system, with the wealth that it has created in the last three decades, and go back to the old national life of restricted resources but unrestricted independence.

## CHAPTER VI.

### THE POOLING POLICY.

HAVING reviewed the several classes of railway discriminations as they are practised, and explained their injustice, illegality, and dangerous effects upon social and political equality, we come to the question, In what direction shall a remedy be sought. Can the operation of economic laws be relied upon to correct these abuses, or must the new power, which has been created within the last two generations, be always regarded as a dangerous element in society, to be constantly and jealously watched by the public and bound down by restrictive legislation? The spirit of American institutions in dealing with all evils, and especially with those arising in the operations of commerce, naturally seeks the method which will involve the least interference with freedom, consistent with the general safety. The commerce which is governed the least, is governed the best. In that respect the claim that the remedy for all inequalities in the practical working of the railways is the regulating influence of the laws of trade, and especially the corrective influence of competition, is very plausible. But it is confronted by the fact that hitherto, in the history of the railway system, the laws of trade have not prevented the maintenance of inequitable rates, the infliction of unjust discriminations, or the domination of great industries by monopolies

fostered by the railways. Before accepting this experience as final, however, and rejecting economic law as an insufficient corrective, it is necessary to inquire whether those laws have had a fair trial. The value of competition as a remedial agency cannot be determined without considering how far the present operation of the railway system limits its workings, and also how far the prevalent railway policy seeks further to suspend and abolish it. This leads us to examine the latest and most powerful development of the railway system, best known as "pooling"—although Mr. Fink desires to have the pools called "associations," and Mr. G. R. Blanchard suggests the dignified term "traffic unity."

Pooling was defined by W. H. Vanderbilt and H. J. Jewett, in their letter to the Hepburn Committee of the New York legislature, as "a successful plan for preventing railway wars and securing uniformity of rates." This definition is open to two criticisms: First, that it fails to give any clear indication of what pooling really is; and, second, that it is a question of fact whether pooling has either prevented railway wars or secured uniformity of rates. Mr. Fink has asserted that the purpose and effect of pooling is to prevent discriminations, and "the establishment and maintenance of uniform tariffs." Neither of these statements gives any definition of the pool. In general, the term is applied to any combination, between railways engaged in competitive traffic, to maintain rates by suspending competition. More specifically, however, pooling includes the only means by which such combinations have been made successful; to wit, the suspension of competition by uniting the traffic in one common total or "pool," from which the business,



or its proceeds, is divided among the various companies in fixed percentages. The policy of combining to suspend competition is an old one; but the conception of a "pool," comprising the business of all the roads and holding it beyond their individual control, dates from Mr. Fink's entrance into the management of the trunk lines, has been applied under his supervision, and is regarded as his creation. The detailed devices by which the business is combined and its proceeds divided vary with the nature of the traffic pooled, and with the agreements which are practicable in each case. The most general form of the freight pool is an agreement allotting a percentage of the traffic to each road, and providing that, if any road exceeds its share of the business, freight shall be diverted from it to the other roads until the agreed proportion is established, thus taking away the incentive for any road to attempt to enlarge its business by lowering rates. Some such "traffic pool" as this has, at one time or another, controlled most of the competitive freight business of the country. The other leading variety, the "money pool," deals not with the freight or passengers, but with the earnings. The money received for transportation is brought together in one total, and divided in fixed percentages among the combining roads. If, as is generally the case, the gross earnings are pooled, this arrangement inflicts a much greater loss upon the railway which exceeds its allotment than the traffic pool. For, in the traffic pool, the excess of traffic is simply diverted from the road; but in the money pool the road which carries more than its share performs the excess of service without any compensation; and the actual cost of this work is clear loss.

There has of late years been a strenuous effort to represent the pool as something else than a device to destroy competition, as, in fact, a corrective of railway evils. The definition of the railway presidents already quoted is one instance, and Mr. Fink's testimony before the Senate Committee, in 1883, is another. "The *principal* object of this association," said he, "is to establish equitable and uniform tariffs over the roads represented on the committee, as far as their competitive traffic is concerned." The qualification contained in the last clause was made more significant by the addition: "It has nothing to do with local traffic." But why has it nothing to do with local traffic? Are not equitable and uniform tariffs as much to be desired in the case of local traffic as in any other? Should not the "prevention of unjust discriminations," the arrangement of rates "so that they will bear equally upon different localities," and "conducting the transportation business in a business-like way, and in the interest of the public and the companies," which Mr. Fink elsewhere alleges to be the object of pooling, be sought as strenuously on local as on through shipments? The fact is, as Mr. Fink says, that the fostering and beneficial operations of the pool have no connection whatever with local traffic, and the reason is, simply, because the one influence that the pool seeks to suspend is already absent from the local traffic. Non-competitive traffic is never turned into the common fund and partitioned among the different corporations. If there is any purpose of uniform methods or mutual assistance, apart from the prevention of competition, why is not the local traffic of the combining roads brought under remedial provisions of the pool, and its proceeds dealt

out in fixed percentages? It is simply because the pool is a device to avoid competition; and where the traffic is not competitive that there is no demand for it.

Mr. Fink has, on several occasions, declared that pooling does not prevent competition. On the face of it, this assertion seems to be a confession of failure; and the natural comment is that, if pools have not prevented competition, it has been from no lack of effort on Mr. Fink's part. But what Mr. Fink really means is, doubtless, that there are certain influences of competition, always indirect or partial, which, in the nature of the case, pooling cannot suspend. The competition of the water routes, for instance, acts directly on the grain-carrying traffic from Chicago, and indirectly on the same traffic carried on parallel routes farther south. The possibility that fresh capital may be brought in to build new competing railways has also been a disturbing factor in the pool. But whatever may be the influence of competition in these imperfect forms, the great object and aim of the pooling policy is to suspend direct competition between the railways. Whatever other administrative duties may be performed by its machinery are subordinated to the grand central object of preventing independent and competitive action by the railways. When the pool has succeeded in abolishing direct competition it is a success; when the natural forces of trade break its artificial fetters, and the competing companies make their rates in accordance with their own facilities for transportation, the pool is a failure. Uniform and equitable tariffs and stable rates are very desirable; but when an organization prevents uneven rates only where there is danger of competition, and leaves them without check everywhere else, we may be

permitted to doubt whether those praiseworthy purposes are its principal, or even among its real objects.

The fact that pooling combinations have for their main and controlling object the suspension of competition, is apparent in their history. That history shows, too, that the railway wars which furnish the excuse for pooling, and mark the epochs of its development, have been waged with the sole object of preventing natural competition, and of forcing the competing lines into combination. The bitter railway contests of 1874-76 were occasioned by the opening of the Baltimore and Ohio's connection with Chicago, and its establishment of a differential rate to Baltimore four cents lower than to New York. The other Chicago lines attacked this policy, resolving to destroy the revenue of the new rival, together with their own, until it should be driven into an agreement in accordance with their views. The effort to abolish the differential rate was a failure; but the ruinous and wasteful character of the wars resulted in bringing the lines together in 1877, organizing the trunk-line pool. The success of that organization, during the first two or three years of its existence, lay in the completeness with which it abolished competition; and the conflicts that have broken out at intervals since have displayed the evident determination of the combining lines to prevent natural and legitimate competition, and to make all independent action so ruinous that no railway could permanently continue it. This has been evident in the operations, not only of the trunk-line pool, but of all the other pooling organizations, which have sprung up under its example, from the Atlantic to the Pacific. While nearly every railway in the country has joined in the pool-



ing policy, none has ever done so until some portion of its traffic was subject to competition, and then none but competitive traffic has ever been made subject to the authority of the pools.

The failure of the pools to suspend competition entirely, and the purpose of the railways to weaken or destroy its influence at all hazards, were signally shown in the closing act of the great railway conflict which has been raging with varying bitterness for more than a year and a half. It was characterized by such extraordinary features as the reduction of entire schedules of freight rates one third or one half at a single blow, and, when its ends were supposed to have been attained, by an advance on rates of 50 per cent. in a day. One notable step was that of the Pennsylvania Railroad, in reducing its emigrant passenger rate from the Eastern cities to Chicago and St. Louis, in a single day, from \$13 to \$1. This was for the avowed purpose, as was every other salient act of this corporation during the conflict, of attacking the revenues of its rivals, and forcing them to restore the supremacy of the pool. The true nature and purpose of all this warfare was shown by the bargain which is supposed to have closed it. The conflict has been frequently represented to legislatures and Congressional committees as an instance of the ruinous effect of competition; but the manner in which the two greatest corporations proposed to establish peace, on the terms which suited them, shows that it was waged by them with the clearly defined purpose of driving out independent competition.

The trouble with both the New York Central and the Pennsylvania railroads, was that independent competing lines had been built, or were in process of con-



struction, into territory which they regarded as peculiarly their own. The Buffalo and West Shore project, the possibility of which had been pointed out by the late J. W. Garrett in 1880, had paralleled the former to Buffalo. The opportunities for loading down the property with fictitious capitalization were too much for its projectors, and, as a consequence, a few months of the war which followed its opening sent it into bankruptcy. At the same time another independent line, the South Pennsylvania Railroad, was building a connecting link between the competitors of the Pennsylvania Railroad, at Pittsburgh, and the western terminus of the Reading at Harrisburg. This was, in all its bearings, a peculiarly legitimate enterprise. An expenditure of \$10,000,000 would open up vast mineral districts in southern Pennsylvania, give the anthracite coal regions a new Western outlet, and complete a shorter and more direct through route from New York to Pittsburgh. The troubles of Mr. F. B. Gowen, in the management of the Reading Railroad, the Eastern connection of this line, brought him into relations with Mr. Vanderbilt, who saw the opportunity to retaliate upon the Pennsylvania Railroad for the support it was believed to give to the West Shore, and to increase his power in the restoration of the combination. There was also a tempting occasion for the most approved methods of stock inflation. This road was in process of construction when, in July, it was announced that a bargain had been concluded between the New York Central and the Pennsylvania railroads, by which the former was to gain possession of the West Shore and the latter was to get control of the South Pennsylvania in its unfinished state, and to use its pleasure as to

completing the work or leaving it to go to ruin. Rumors to this effect had been heard for some days. Mr. Vanderbilt, with that striking frankness which sometimes throws a world of light on the railway magnates' view of things, had declared that while he could not say that such a bargain was completed, he regarded the West Shore as "a common, miserable thief," which "had been caught with its hand in his pocket," and he declared that the war on the part of the New York Central would never stop until it gained control of the West Shore. This assertion of the railway's property rights in the transportation business of the cities along its line, and of the determination to choke off any criminal who attempts the felony of competition, was not repeated in words by the less talkative magnates of the Pennsylvania Railroad, but their acts had no less plainly shown that they were determined to ruin all their rivals unless the encroachments upon their territory were stopped. By the latter part of July, the official declaration of the bargain put it beyond doubt. The New York Central obtained, through the aid of the Pennsylvania Railroad capitalists and a syndicate of New York brokers, a lease of the West Shore on a reorganized capitalization of \$60,000,000. The Pennsylvania Railroad is to obtain control of the South Pennsylvania and the Beech Creek, another road in which Mr. Vanderbilt was interested, by the issue of securities to the amount of their supposed cost, bearing interest at three per cent. Each corporation is thus protected in the exclusive possession of its darling local traffic, and, it has since been rumored, the great combination is to exercise its power to shut out the Baltimore and Ohio from New York, and to

rule the transportation of the country between that city and the Mississippi River. Apart from the betrayal by Mr. Vanderbilt of his partners in the South Pennsylvania enterprise, who had undertaken in good faith to build a new line from Pittsburgh to the East, the bargain receives additional significance from the fact that any acquisition by a railroad of a rival line is forbidden by the constitution of Pennsylvania in the most sweeping terms. The prohibition covers the purchase, lease, or "control in any way" of the property or franchises of "any rival or competing line." This provision was framed for the express purpose of protecting competition. It left no possible way in which the Pennsylvania Railroad could legally gain control of the South Pennsylvania. Yet it was freely announced that it would take possession, and would furnish the securities by which the bargain was to be consummated. It was an open secret that the constitution was to be evaded by the agency of a subordinate corporation, a transaction which was characterized by one of the highest legal authorities of the state \* as "a clear fraud upon the constitution."

An injunction suit, brought by the attorney-general of the state to prevent the consummation of the transaction, has been met by some astonishing arguments. The president of the Pennsylvania Railroad declared in his testimony that he did not make the agreements as president of that corporation, because it was not legal; but he did it as president of a minor corporation, which was owned and controlled by the Pennsylvania Railroad. Yet how clearly this was a mere evasion is shown by his declaration elsewhere, that he would not

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\* Hon. Daniel Agnew, ex-justice of the Supreme Court of Pennsylvania.

have made the purchase if left to himself, but was constrained to do so by the wishes of his associates, and of the directors of the Pennsylvania Railroad. The South Pennsylvania, it was argued, was not a competing line, because it was not yet completed, and, as the brilliant president of the New York Central put it, was simply "a lot of holes in the ground." But the investment by the Pennsylvania Railroad, through its agents, of \$5,500,000 in these "holes in the ground," was justified and declared to be necessary, because the new road, if completed, would be "a disturbing factor in the trunk-line situation." Under such pleas as this the Pennsylvania Railroad hoped to buy up and destroy competition, notwithstanding the prohibition of the state constitution.

But while the acquisition of the South Pennsylvania and West Shore roads illustrates the evils of stock-watering and construction-company contracts, and the defiance of constitutional law by the railways, it is especially significant in the light which it throws upon the true causes and purposes of the conflict which it seems to have ended. If there were any doubt left by these facts, the purpose has been clearly avowed by the representatives of the trunk lines themselves. Mr. Vanderbilt's declaration that his corporation would never cease from war until it had obtained control of the West Shore has already been referred to. Since the attorney-general of Pennsylvania has commenced injunction proceedings to enforce the provisions of the constitution, it has been openly declared, by the organs of the Pennsylvania Railroad, that the railway war was prolonged by this opposition to the consolidation, and that it could not be ended until the Pennsylvania road



had undisputed control of the independent project. By these declarations the railway authorities put the recent war in its true light. When they struck at each other's revenue by reducing rates one third or one half at a single blow, they were not competing; they were aiming at the destruction of competition. They declared, by their acts, that they would keep up their policy of mutual destruction until their rivals were driven to terms; and the real purpose of the late contest is placed beyond all doubt by the great bargain in which competition was strangled. The railway kings waged the late war, disturbed business by violent fluctuations of rates, tumbled the investment market into chaos, wasted the revenues of their corporations, and finally added \$74,000,000 to the totals of their stock and debt, for the clear purpose of driving the roads which competed for their local traffic into consolidation, and of forcing the outside corporations, which they could not absorb, into combination with themselves.

The success of the pooling policy in maintaining rates and suspending competition has been far from complete. In the first few years of its operation it was able to advance the rate from Chicago to the East to the high figure of 45 cents per hundred pounds, and to keep it at 30 to 35 cents for a considerable period. But the wars of 1879, 1880, and 1881 brought rates down again, and, for most of the time since, their efforts to maintain them above the 25-cent basis have been futile. Within the last two years the attempt to maintain rates by the power of the pools has been an almost entire failure, and it is yet an open question whether the effort to restore them will be successful.



The degree of success or failure which has attended the various pools has depended partly upon the character of the devices resorted to, but still more upon the external conditions surrounding the traffic pooled. The mere agreements to sustain rates made by the trunk-line presidents, during the years from 1875 to 1877, when there was not enough business to keep all their lines employed, hardly yielded results worth the trouble of making the compacts. The first institution of the policy of pooling and dividing the traffic, under Mr. Fink, was less stringent than any subsequent pool, as regards its provisions for sustaining rates and its power to enforce discipline; yet it was more successful in keeping up rates for a period of years than any of the improved and strengthened compacts in succeeding years. This can be explained on no other hypothesis than its good-fortune in that, shortly after its organization, a period followed when the large exportations of agricultural products and the general revival of prosperity furnished to all the trunk lines a volume of business which took away the inducement for cutting rates. The first pool bridged over the short period from 1877 to the revival which began to make itself apparent in 1878. In subsequent years, when expansion of the breadstuffs movement had ceased, while, on the other hand, the factitious prosperity of the trunk lines under its workings had brought new competitors into the field, and compelled the further division of the traffic, the power of the pool began to wane. New devices to strengthen it were constantly adopted: arbitrators were appointed to revise its awards of percentages, advisory commissions to settle its principles, power was granted to cut rates as a

means of punishing surreptitious reductions, and, finally, the money pool was tried. When this last and most stringent plan was adopted, it was heralded as a provision which would forever abolish the deplorable vice of cutting rates. Yet its failure permanently to uphold rates was made manifest in the autumn of 1884 and the opening of 1885, when, as was stated by Mr. Fink in one of his reports, the money balances were regularly adjusted, but the rate-cutting went on. In the absence of traffic to keep all the lines employed, even this extraordinary provision for strengthening the pool and mulcting offenders against it proved unsuccessful. At the close of the period we have reviewed the largest railway owner in the country was quoted as declaring that pooling, in the case of general railway traffic, is only successful when business is good, and cannot avert low rates when business is poor. Mr. Fink has recognized the logic of events by declaring that, for the full maintenance of rates, the pooling combinations must have legal recognition and authority to enforce their contracts on the roads. This is, however, but one side of the picture. It must be acknowledged that the pooling devices have succeeded in bridging over several periods of threatening adversity, and that, on the whole, they have for considerable periods suspended competition and secured to the railways artificially high rates. This qualified success has been largely dependent on the absence of the inducements to rivalry; and when the strength of the pool has been tested by a long period of light shipments and business depression, its most stringent form has proved a failure.

On the other hand, it appears that one class of com-

binations has been totally exempt from the weakness of pools in general traffic. The three prominent cases have been: the combination of the trunk lines in the petroleum traffic, the anthracite-coal combination, and the live-stock pool as it was maintained prior to 1880. Each of these combinations has been remarkable alike for its stability, in contrast with the pools in general business, and for its disregard of public interests and public rights. It will be observed that in each of them the cohesive power appears to have lain in the private interests which controlled the action of the officials of the roads. In two of these cases a shipping firm, in consideration of special rates or drawbacks, undertook to divide the traffic in fixed proportions, by giving such of the roads as fell behind their share during one period enough of its freight shipments during the period succeeding to make up for the shortage. The live-stock pool, which granted a rebate of \$16 per car to a prominent Chicago live-stock firm for performing this service, was the shortest of these combinations in duration; but its operation for more than two years was sufficient to illustrate the workings of the method. It is to the credit of the trunk-line pool that this discrimination was finally abolished, on a plan presented by Mr. Fink in 1879. The relations of the Standard Oil Company with the trunk lines have always borne the character of a combination. In the early days of its career it may have been simply the beneficiary of an agreement between the railways. It enjoyed a contract for special rates, and for the division of traffic between the two New York roads, from October, 1874; but its power in connection with the Pennsylvania Railroad was not so fully defined un-

til 1877 or 1878. The termination of the contest between the Pennsylvania Railroad and the Standard, in 1877, completed the grasp of the latter corporation on the petroleum business. At the same time the trunk-line pool was formed, a fact which is suggestive as to the influences that led the railway company to end its conflict with the Standard. The trunk-line negotiations were used to bring the Pennsylvania Railroad to the full support of the Standard's monopoly, and one of the most important and enduring results of the pooling agreements of 1877 was the establishment of the petroleum pool, in which the Standard occupied the position of evener as well as beneficiary, and held the power to discipline any road that might break away from the combination. Whatever indefiniteness there may have been in the pooling arrangements previous to that time, there is no doubt as to the agreements referred to in the account of that organization, by which the Standard agreed to maintain the percentages assigned to each railroad, and the railroads agreed to protect the Standard against competition. This climax and triumph of the pooling policy beggars criticism. The combination which sustains rates by rendering it impossible for any shipper to exist, save the power which makes the division among the various roads, may well be regarded as "a successful plan for preventing railway wars and securing uniformity of rates." However its success may be questioned in other arrangements, there is no doubt that the pooling plan, of which the Standard is the cohesive power, has, since its final triumph, been wholly successful in abolishing railway wars between the lines which made themselves its servants, and securing such "a uniformity of rates" as shuts out all other shippers of petroleum.



The anthracite-coal combination exhibits the successful working of the pooling policy under somewhat different circumstances; but it is a no less significant instance of the suspension of competition. The application of that policy to the anthracite coal traffic was probably the first form of pooling practised. The exact character of the early anthracite pools is not publicly known; but as early as 1871, an investigation was ordered by the Legislature of Pennsylvania into the character and effect of an alleged combination between the anthracite roads. During this investigation representatives of the railways testified that there was no compact or agreement between the roads for limiting production or enhancing the price of coal. It was afterwards asserted that this testimony had been made possible by abrogating the agreement before the investigation, but that, while the written compact had been destroyed, the understanding continued in force as before. Whatever may have been the case before 1871, it is certain that, ever since that time, the anthracite-coal traffic has been controlled by a combination of railways, as open and undisguised as the trunk-line pool, but far surpassing the wildest ambition of that organization in its control of private business, its restriction of production, and its successful measures for increasing prices to consumers. In this case the evils of combination have been increased by the direct interest of the companies in the business which furnishes their chief traffic. The legislative investigation referred to showed that excessive and outrageous discriminations against shippers had been made by the coal roads. After a thirty days' strike the private mine-owners had consented to the wages demanded by the miners,



and would have supplied a large trade; but the railways, which were also miners as well as carriers, and were determined not to yield to their men, raised the freight rates of the private firms to three times their former standard. By this means the price of coal was brought up to \$12 a ton, and the private operators, their workmen, and the consumers of coal were made to feel the power of the great railway and mining companies. It is not necessary to follow out in detail the steps by which the railways established their absolute power in all branches of the coal trade. Enough that the result is that of 270,000 acres of anthracite coal lands in Pennsylvania 195,000 are now owned by six railways. One effect of uniting, in the same corporations, the business of shippers and that of carriers is the enormous inflation of their capital. Their aggregate capitalization amounts to \$500,000,000, while the actual cost of the roads and equipment for transportation is \$114,000,000.

For the purpose of securing a profit on this stupendous amount of inflated capital, the policy of combination has been carried to an unequalled extent. Not only was competition in transportation suspended, by a division of traffic between the railways, but the competition of the mines was stopped, as far as possible, by agreements which limited the output of anthracite coal to an arbitrary total fixed by the combination.\* These agreements are enforced by ordering the suspension of mining at such time as the railway combination determines; sometimes for one quarter of the working time in a year. We have seen that the combination con-

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\* 30,000,000 tons annually during the past two years.

tends as vigorously to prevent an advance of miners' wages as to maintain the price of coal; and hence the artificial advance of price brings no corresponding increase of pay to the labor employed. In fact, statistics show that the average wages paid to the men engaged in this severe and arduous work ranges from \$350 to \$400 per year. The restrictive powers of the combination are extended over the distribution of the product. No wholesale dealer can engage in the anthracite coal business without the consent of one or the other of the lines forming the combination, or without conforming to the fixed and arbitrary wholesale prices prescribed by the companies. Some of the eccentricities of the artificial means used to sustain prices have been exposed in a previous chapter. The burden of the control, established over both producers and consumers, by the anthracite and bituminous coal combinations, has been estimated at \$31,000,000 annually. Whatever may be thought of the accuracy of this calculation, there is no doubt that the combination controlling the coal trade of Pennsylvania has, by restrictions upon that industry and artificial prices for its products, inflicted a vast and wholly unjustifiable burden upon the producers and the public.

These three most successful examples of the combination policy show that the most powerful and permanent pools in railway traffic are those which are associated with vital discriminations. It may be questioned whether the discriminations give strength and permanence to the pool, or whether they can be maintained only by a pool which is strong in itself. The anthracite pool is solid and enduring, as much because the companies are miners and shippers of coal, and wish

to obtain artificially high prices for their product, as because they are carriers and wish to obtain high rates of freight. But, in the other pools involving a favored interest, it is an interesting question whether the cohesion is furnished by the presence of a large shipper, able, by controlling the traffic, to maintain a division of the business between the roads, and to punish rebellion by diverting shipments, or by the superior zeal of the railway managers, who care more to benefit a business in which they are individually interested, than one in which only the profits of the railways are involved. The latter theory receives some corroboration from the fact that it does not seem to make much difference, in cases of this sort, what the devices of the pool may be for its preservation. It may be a simple and perhaps tacit compact, as in the early stages of the combination which fostered the Standard Oil monopoly; or a division of the traffic, as in the later stages of the same pool, and in the case of the "eveners' pool" in the live-stock trade; or a division of territory, as in the case of the bituminous-coal companies; or a combination of all these features, with restriction of production and arbitrary prices for the product, as in the case of the anthracite-coal pool. The presence of a shipping interest, with special favors or exclusive control, has always produced the greatest degree of cohesion and success in the pooling combination. The fact is significant that the most successful pools have been those which have built up monopolies.

Another point of weight in estimating the ability of pools to suspend competition is that these devices have proved successful in inverse ratio to the number of different lines combined. Where there have been but

two roads engaged in the traffic, as in the bituminous-coal agreements, or three, as in the Connellsville-coke pool, and in the first stage of the petroleum combination, the primitive form of a simple agreement to sustain rates has frequently proved successful. When, in the last-named case, the number of roads concerned increased to four, a more stringent combination was required, and was made. When there were but four lines engaged in the trunk-line traffic, Mr. Fink's first pooling arrangements proved sufficient to maintain rates for a term of years; but, during the last twenty months, with seven separate corporations to share the traffic, all the additional safeguards and precautions which seven years of experience have suggested to his inventive mind have proved inadequate to hold them together. The same is true of all pooling combinations. If a hundred different railways were competing for the same traffic, it would evidently be impossible to obtain unanimous consent to the establishment of a pooling combination. Perhaps a dozen or a score of competing companies might be brought to form such a compact; but to make them all adhere to it would be utterly impossible. In short, it is a general principle, which limits all attempts at pooling traffic, that competition can be suspended only where the number of competitors is limited.

The leading claim in support of the pooling policy is that it aims at uniformity of rates. Such uniformity is, no doubt, highly desirable for the public as well as the corporations. Railway reformers demand uniform rates upon an equitable standard. But, to judge whether this end can be attained by the railway combinations, it is necessary to consider, first, what the result will be if the objects of the pools can be per-



fectly attained ; and, second, what result is actually attained by pooling as practised. If the pooling managers should perfect their ideal, it may be doubted whether a uniform and permanent tariff, such as would be established by men whose sole purpose is to get the utmost possible revenue out of the traffic, would be a public benefit. However favorable to commerce the uniform adherence to fair and moderately profitable freight rates may be, there would be no public benefit in the permanence of rates at twice that standard. For instance, the permanence of the grain rate from Chicago to the seaboard at 45 cents, after the competition of the railways had reduced the rate below 20 cents, the lower rate at least yielding some profit, has little to recommend it in the interests of general commerce. If the pool would maintain equitable rates its success might be desired ; but what guarantee is there that the complete establishment of its power would make such rates ? Its very character, the functions of the men who control its policy, and its avowed object of swelling the earnings of railways by artificial methods, forbid such an expectation. Make the success of the pool absolute, so that it can work without fear of competition, and its rates will be uniform ; but of such a character that their uniformity will be a public grievance and burden.

The apostles of the pooling theory have earnestly insisted, of late, that the object of pooling is not to advance rates. Thus, a pamphlet by Mr. G. A. Blanchard alleges that "traffic unity has reduced rates and increased tonnage," adding rather disingenuous tables of the rates in force at the establishment of the pool in 1877, and at the date of the pamphlet. The same



claim was made in general terms by the United States Bureau of Statistics, in a report which advocates the pooling doctrines. It says: "The volume of traffic has also enormously increased and rates have constantly fallen." These statements are only partly true, and suggest an inference which is wholly incorrect. Rates have not constantly fallen during the existence of the pools. For the first few years of these combinations rates were advanced and kept up. The original trunk-line pool, whose success led to the adoption of the same policy by all the railways of the country, advanced rates as fast as its ability to do so was demonstrated, from the 15-cent basis at Chicago—which had ruled during the preceding period of severe competition—to a basis of 30 and 35 cents, and finally of 40 and 45 cents. It is certain that further advances were only prevented by the knowledge that the traffic would wait for the opening of the water-routes, and thus avoid the imposition of double rates by the railways. Since the establishment of these high rates in 1877 and 1878, rates have taken a downward course; but this was in spite of the pools, and not as a consequence of their operations. Every reduction in rates has been in consequence of a revolt of one railway or another from the rule of the combination; every restoration of the pools has been accompanied by an advance of rates. A result which it is the main purpose of these combinations to prevent cannot be made an argument in their favor. Railroad federation may not yet have been able wholly to suspend the operation of competition; but its failure is due rather to its lack of power than to its lack of desire. A thief may be caught and lodged in the penitentiary; but this demonstration of the

power of either statute or economic law is no argument in favor of the practice which called it forth.

In contrast with the ideal of the railway managers stand the actual effects of the pool upon uniformity of rates. It is natural that reactions from attempts to sustain rates by arbitrary means should produce great variations and sudden changes. Every year of the period since pooling became general, and almost every month in the last two years, furnish illustrations of this fact. Thus, in 1879, the East-bound rates from Chicago were reduced, in a few months, from 45 to 15 cents, and then raised again to 40. Thus, in nearly every month of the last fifteen, there have been one or more changes in the rates on leading classes of trunk-line freights, varying from the usual change of 20 per cent. at a time, on grain freights, to the unprecedented reduction of 92 per cent. on emigrant rates made by the Pennsylvania Railroad in January, 1885. All these variations of rates were the result of efforts either on the part of some road to obtain better conditions for itself in the combination, or, on the part of the combination, to drive refractory roads to submission, by destroying their revenue. The more extreme and violent the changes, the more clearly were they the result of the pool influences. When we remember that before the combinations began these violent and unexpected changes in rates were almost unknown, it will be seen that the actual operation of the pooling policy has been, not to establish uniform and equitable rates, but to produce irregular periods of high rates varied by seasons of extreme changes, which have wrought great injury to commerce.

Another claim of no less importance, though per-

haps less prominent, is that pools prevent discriminations. This is what neither law nor public opinion has yet been able to do, and it would be a great achievement for the combinations. Perhaps a sufficient answer would be simply that they have not done so. If seven or eight years of pooling have effected no appreciable improvement, how long are we to wait before the reformatory influences begin to work? But the failure may be due to human imperfections, which would be abolished if the pooling combinations are perfected. Let us then consider what tendency to prevent discriminations there is in devices to suspend competition. The claim, as hinted by Mr. Fink, and stated more directly by other advocates of the policy, is that it prevents discriminations, (1) by removing the fluctuations of rates under competition, which will give one man a cheaper rate in the morning than another will get in the evening; and (2) by taking away the forces which give a competitive point cheaper rates than a non-competitive one. It is true, as shown in preceding chapters, that many discriminations arise from the inequalities of competition; but the remedy of entirely destroying competition is too much in the style of that mediæval school of treatment, which cured a severe cold by throwing the patient into a much more dangerous fever. At any single point of shipment, the inequalities of rates under general competition are never very serious. There is more truth in the claim, that the success of the pool in sustaining rates, at competitive points, would diminish the tendency to discriminate against freight from other points. But the actual workings of the pools reduce the value of this result nearly to zero. The different lines are

left entirely to their own will as regards the local rates. No matter how well through rates may be sustained, any line may impose ten times the proportionate rate on its local traffic, so far as pool regulations are concerned. Any railway can indulge in as wild vagaries of discriminations and inequitable tariffs as it pleases on its local traffic, and the pooling authorities will never offer a protest. All the numberless forms of discrimination between places, persons, and classes of freight, which grow out of the absolute control by a railway of its local traffic, are left unchecked by the pool; and the value of this alleged preventive of discrimination is shown by the fact that, after seven years of pooling, not a single case is on record in which the pool has checked any display of partiality, however flagrant, by one of its members in its own local traffic.

If a number of competing railways should combine, with the sincere intention of abolishing all favoritism in rates, they might be able to accomplish much good. But if they combine for the purpose of upholding such favoritism, the evil is doubly intrenched behind the authority of the pool. The fact is that no pool ever was organized for the purpose of abolishing discriminations, while some of the most prominent and successful pools have existed apparently for the purpose of upholding such discriminations. It is possible to imagine a combination, under the control of a man like Mr. Fink, who uses all his power to establish practical equality in rates on the majority of the traffic which he controls. It is no less possible to imagine that even such a pooling authority may be forced by the interests of the railways, in a particular branch of traffic, into an unreasonable discrimination; as when the economy



made by doing away with the transportation of useless weight, by shipping dressed meat instead of live-stock, is annulled by putting the freight rates 70 per cent. higher than on the old method of transportation, which some of the railways are interested in preserving.\* Further, the facts force us to take into consideration combinations which no imagination could easily originate, in which the influence of the railways upon each other and the commercial public is consolidated, for the express purpose of maintaining and perpetuating most unjust discriminations. When Mr. Fink is able to erase from commercial history such gigantic facts as the Standard Oil Company, the anthracite pool, and the live-stock discriminations, his claim that pooling prevents discrimination may have some weight, but not until then.

In practice the pool simply strengthens the arbitrary and unrestrained power of railway officials over part of their traffic, and thus facilitates all vital and injurious forms of discrimination. While the uneven action of competition may produce inequalities of rates, the cause of discriminations between localities is that the railways are free from competition at local points. It is their exemption from competition, too, which enables them to establish arbitrary and unjust differences be-

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\* Before the Hepburn Committee Mr. Fink correctly said, "The proper basis of railroad tariffs is the cost of transportation." With regard to the live-stock and dressed-beef rates, he stated the principle on which the matter was settled to be that of putting "the dressed-beef and live-stock shippers on the same footing, as regards the cost of transportation (which in this instance means freight charges) of the product of the animal to Eastern markets." In other words, the economy of the dressed-beef shipments was to be destroyed, for the benefit of the live-stock interests of the New York Central and Pennsylvania Railroad managers.



tween shippers in the traffic over which they have absolute control. This absolutism is extended and strengthened by the pool. Evils which were upheld by a single corporation are supported by the united force of half a dozen, and the favoritism that was before confined to the local traffic of the lines may be extended and enforced at competing points. Even admitting that the pool will abolish the discriminations complained of, it will also abolish the freedom of trade movements and the operation of natural laws of commerce, in whose defence alone the practice of discrimination is resisted. The railway pool, as a remedy for discrimination, is a leap, from the frying-pan of inequitable and partial exactions by the railway power, to the triple-heated furnace of absolute and arbitrary rule, imposed by the combination of all roads and the more or less complete abolition of competition.

It is not meant that pools do nothing but work for the suspension of direct competition; but it is clear that the suggestion of anything else as their principal purpose is misleading and uncandid. A passage of Mr. Fink's testimony before the Senate Committee, in 1883, is a striking instance of this.\* The Commissioner

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\* In Mr. Fink's testimony before the Senate Committee on Education and Labor, after stating that the principal object of his organization was "the establishment and maintenance of uniform tariffs," he said: "It would not do for many companies to operate each road separately from the others. They have to arrange with each other to form connections, to establish through lines of transportation, and tariffs for such through lines. It is a very complicated question to make these tariffs uniform on many competing lines, and to arrange them so that they bear equally upon different localities, and to avoid unjust discrimination, and it is still more difficult to see that the tariffs properly established over so many roads are maintained alike to all shippers receiving a like service. To accomplish this is the object of the bureau, which is established

of the trunk-line pool has at other times alleged the facilitation of through shipments, forming connections, establishing through lines of shipment, and tariffs for such lines, to be an important work performed by the pool.\* It is not to be denied that the establishment of facilities by which goods can be shipped, on a single bill of lading, from New York to Omaha, is highly important; and it is also true that in some measure this work is performed by the pooling arrangements. But it is only incidental to the main object of those arrangements, and is by no means their principal function. How essential this distinction is, may be seen from the character of the pools. If the improvement of facilities for through shipments were the object, the pools would be made up of connecting and not competing lines. The fact that such combinations are always made by the competing lines, already established between leading points, and that the lines connecting with them beyond those points are left to the care of other pools, shows that the facilitation of through shipments does not weigh a scruple in the scale against the main object of suspending competition. Again, through bills of lading, and connections from the East to the West,

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in the interest of the public as well as in the interest of the railways."

\* "These associated companies assume the responsibility of delivering the freight to points of destination beyond the terminus of the road which originally receives the freight. They issue through bills of lading, and make all proper arrangements for the transfer of the freight from one road to another, for settling the freight charges of each road, and adjusting all legitimate claims for loss or damages accruing on any part of the route, thus relieving the shipper from the great trouble, annoyance, and expense dependent upon making separate arrangements with each road over which the freight passes."—*Mr. Fink's letter to New York Commission, January 29th, 1885.*

were established before the pooling associations ever took charge of the work, and the improvement under that method is of slight if not doubtful value; while as to the establishment of through routes of transportation, so far from that work being done by the pools, it has always been done outside of the pools, and when accomplished has, by its competition, always produced a new disturbing element in the working of those combinations.\*

The examination of these pleas for the pools having shown mainly what they do not do, the next step is to examine what they really do effect. In the first place, they create an enormous and unrestrained power over commerce, which is not provided for in legislation. A journalist, writing of the trunk-line pool in no unfriendly spirit, represents it as bearing the same relation to the railways that the federal government does to the states; and asserts the commissioner's duties, in their scope and influence on the business interests of the nation, "to be only second to those of the President of the United States." Such a view of the combination has been deprecated by Mr. Blanchard; but if this account of the power of the trunk-line pool over the material interests of the nation is defective in anything, it is in making the pool second to the United States government. The sole advantage possessed by the United States government is in the power directly to enforce allegiance to the compact of union; while any disaffected member of the pool may secede. This right of secession is a

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\* "Through bills of lading were issued long before the organization of the trunk-line pool, and the service then rendered was quite as satisfactory as under the present system."—*Letter of Traders and Travelers Union to New York Commission, February, 1885.*

thorn in the sides of the advocates of pooling; and the latest development of their theory is a demand that pooling compacts be made enforceable by law, so that no one shall be able to withdraw from the combination when once it is formed. If this were done, the anomalous combination of corporations would clearly hold a power over business vaster than either the United States government or any other, under a representative system, ever possessed. Neither Congress nor a state legislature would dare to pass an act affecting values throughout the country, or making an important change in taxation, without thorough discussion before the public. If it is proposed in the national legislature to make a change of 10 or 20 per cent. in the tariff, the subject occupies the attention of Congress or its committees for an entire session, or sometimes for two, and a notice of several months is given before it goes into effect. But the executive board of a railway pool, meeting in a private office, will in a day's session make changes in rates which affect commerce more than any single tariff bill, and enact edicts which may suspend the movements of great staples over half the country. The eulogist of the pooling system who placed the pool commissioner second in power to the President of the United States and made the executive committee less mighty than Congress was too modest in his claims for the combination. No such consolidation of railway power was contemplated in the legislation establishing the railways. The spirit of American institutions is inconsistent with such vast and arbitrary powers over public interests. The agencies of the government are carefully restricted and guarded against possible excess in their employment. Every power that can affect the



actions or welfare of a large number of people is hedged around by the most careful safeguards, and jealously watched by public opinion, save one. That one is this anomalous combination of the corporate creatures of legislation; a combination for which no warrant can be discovered in their charters; but which has risen to a control over commerce that was never conceived until the pool showed it to be possible. If, as has been shown, the separate and individual power of the railway corporations, each over its own business, is of dangerous extent and requires constant watching and most careful restrictions, how much more alarming is the combination which consolidates that power, and seeks to establish a centralized control over all the avenues of trade? When we find the orders of the pool issued in New York and repeated in San Francisco;\* when we see it maintaining a monopoly of one great industry, and dictating the number of days in which a great industry shall stand idle, fixing a limit on the aggregate production, and prescribing the prices at which the staple shall be sold, we ought to be able to recognize that such combinations are not only unauthorized in law, but wholly at variance with the principles on which representative government and popular independence are founded.

From this unrestrained control of business interests,

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\* Circular of George W. Ristine, commissioner of the Transcontinental Association, repeating Mr. Fink's order that local rates shall be charged on freight which was shipped from New York by the Delaware, Lackawanna, and Western Railroad. This is a striking illustration of the unity with which widely separated organizations act in concert, as it notifies the merchants of San Francisco that the rates given them by the contracts of Pacific coast railroading would not be maintained, and that the contracts are abrogated on that class of freight, because the railroads on the other side of the continent are in a quarrel.



the most flagrant and dangerous abuses can spring. The connection of the pool with some notorious discriminations, and with the growth of at least two great monopolies, has already been described. But fully to appreciate its effects we must note the fact that, without this very policy of combination, which is alleged to cure discriminations, these abuses could never have been accomplished. No single railway could ever have perpetrated the Standard Oil infamy. Without the combination of all the anthracite-coal roads, the domination of that industry would be impossible. While one of the trunk lines refused to support the discrimination against dressed beef, the rates on that class of shipments were brought down to less than half of those established by the pool. A single railway can maintain a marked and inequitable favoritism between individual shippers on its line. But to establish a discrimination against an entire interest, or to maintain domination over an important industry, the union of all the railways engaged in the traffic is necessary. When that union is accomplished by the pool, what is to prevent it from extending and increasing just such abuses as those already mentioned? If the pooling combinations are made permanent, why may they not apply to the iron industry the same policy that has conquered the petroleum refining industry? The main difficulty is to devise a pool which will hold together firmly enough, and in such cases the profit to be gained by a monopoly of any great industry has always furnished the most effective cohesive force. Why might not two or three more roads be added to the present trunk-line pool, prohibitory rates be placed on imported iron, and the business of the iron trade given

to half the mills and furnaces by discriminating rates, as was done by these same trunk lines in the case of the Standard Oil Company, while the other half of the works are forced to suspension and decay? All this might be done on the plea of preventing undue competition, sustaining uniform rates, and making an equitable distribution of business, with as much plausibility as some other things have been done in recent years. Or if the railway combination prefers, what will prevent it from taking possession of such portions of the iron industry as it may select, and then dictating the wages of the workmen, ordering the suspension of production, and fixing arbitrary prices to every private buyer of nails or finished iron? What has been done in one industry can be done in others; provided only that a combination can be formed binding the railways to such a policy. Let the principle of pooling be completely carried out, and the country may be made dependent upon one monopoly for its supply of iron, upon another for its bituminous coal, and upon others for its meat, its cotton and woollen goods, and its glass-ware, just as it now is for its petroleum and its anthracite coal. The one barrier which stands between the people and such a state of affairs is the failure of the railways to make their pools sufficiently compact and permanent. It should not escape public attention, as it cannot escape the attention of the railway managers, that the greatest pecuniary rewards to themselves, if not to their shareholders, and the most powerful aid in solidifying their combinations, will be obtained by establishing such monopolies as have been created by the railway power in petroleum and anthracite coal.\*

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\* Another less prominent example might be added to these in the gas-

It is one bad feature of pooling combinations that they tend to deprive the public of the benefits of improvement in the railway service. They destroy the motive to attract patronage by improved service or by cheaper rates. It is true that this policy leaves the railways free to secure for themselves all economies that can be made by lessening the cost or increasing the safety of their work. But they no longer have any inducement to extend the benefit to the shipping public. It is folly for a pooling railway to offer increased accommodations to the public, in hope of securing increased patronage; for the road will get from the pool exactly its allotted share of patronage, whether it affords the best or the poorest service to the public. If it gives the best accommodation, and thereby secures more than its share of patronage, it must hand over its excess or an equivalent in money to the other members of the pool; if it gives the worst accommodation, and thereby loses business, the loss is made up by the pool from the more enterprising and prosperous roads. The effect of the whole system is to allow economies for the benefit of the railways, whether by improvements or merely through niggardliness; but to destroy all motive for striving to render special service to the public. The discovery of devices for cheapening the services of the railways to shippers or travellers is not a benefit to the pool. The fundamental idea of these combinations is to divide the traffic among the railways by an arbitrary rule, destroying the inducement to attract business by giving the public the benefit of

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coal industry, which is operated solely by the favoritism of the Pennsylvania Railroad and the Baltimore and Ohio Railroad. The coke trade is also undergoing the same process.

improvements and economies. When the pool protects its members against loss by the reduction of traffic that naturally follows mean accommodations, the public interest is greatly prejudiced. The result of such protection must inevitably be, as declared by the New York Court of Appeals of a similar pool, "that the freighters and passengers would be ill-served, just in proportion that carriers would be well-paid." \*

The artificial maintenance of rates by pooling combinations has several positive drawbacks, considered solely in the interests of the corporations which form the pools. Most prominent among these is the fact already mentioned, that its success directly and powerfully stimulates the construction of competing and parallel lines. The trunk-line pool demonstrates this fact. While there were but four lines performing the great services of transportation from East to West, the idea of constructing parallel lines to divide the business seemed wild and impracticable. But the pool created an artificial profit on their business for some years from 1877, and three new competing lines were constructed under independent management; while two more were established under the control of the already existing

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\* The New York Court of Appeals, in declaring the pooling combination of canal-boat owners to be illegal, pointed out this inevitable tendency as follows: "The association being thus secure against internal defections and external encroachments, and the members having thus thrown their concerns into stock to derive an income in proportion to the number of shares they hold and not according to their merit and activity in business, and safe against the reduction that would otherwise follow mean accommodations and want of skill and attention, the public interests must necessarily suffer grievous loss. Indeed, the consequence of such a state of things would be that freighters and passengers would be ill-served just in proportion that carriers would be well-paid."—*Stanton vs. Allen*, 5 Denio, 434..



lines which desired a larger share of the traffic. The addition of new trunk lines has thus been largely in excess of the growth in the volume of through freight.

Perhaps new trunk lines would have been built if there had been no pool, and there might have been some inflation in their stocks and bonds; but the profits made by the artificial rates of the pool stimulated such operations, and led to the extravagance with which they were carried out. It has been recognized by leading railway men, in the language recently attributed to one of them, that "pooling increases the temptation to build unnecessary roads." It must also be acknowledged that pooling places circuitous and disadvantageous routes on an equality with those which are direct and best prepared to perform the work of transportation. The theory of the pool is that the strong and direct lines must divide their business with the weak and roundabout ones, not out of generosity, but lest the latter should cut rates and cause the former loss. This has been carried to the remarkable result, in the passenger pools, of declaring that roundabout lines shall have the privilege of carrying through passengers at less than the regular rates, in order to gain business by compensating for the loss of time. In other words, the principle of "differentials," in passenger traffic, means that the roads shall be put on an equality, by letting some of them perform more work for a less charge. This may be correct if the maintenance of artificial rates is an absolute necessity; but if it is not, the roads which are able to do the largest business most directly and expeditiously can, it is evident, make a profit at rates which will bring only loss to those which are struggling under a load of debt, or



must haul their freight over a long and indirect route. In this respect the pool exhibits the weakness of all combinations, whether trade unions or pools of capital; it throws the burdens on its energetic, solvent, and capable members, and diminishes the penalties for inefficiency and insolvency.

Another unfavorable influence of pools upon the railways is their tendency to increase the frequency and violence of railway wars, to which the companies resort in order to secure advantages in the combination. These contests are appealed to as justifying pools, but, in fact, their extreme character is simply a result of the pooling policy. The notion that the pool is essential to the prosperity of the railways, being generally accepted as railway gospel, the universal effort in case of disagreement or rebellion is to inflict such loss and damage as will drive the offending members back into the pool. If a railway can vitally damage the business of its rivals, it is reckless of the loss to itself, hoping for compensation when the pool rates are restored. Thus the rivalry goes on from bad to worse, each contestant hoping to drive its opponents back into the pool on terms to be dictated by itself. But it is essential to observe that the bitterness of these contests is not the result of legitimate competition, but is caused by the control of the pools. The pool abolishes the natural competition, which brings rates into just relations to the cost of service, as completely during its periods of rupture as during its periods of success. The fierce and ruinous rivalry which springs up whenever the members of the pool fall to quarrelling is simply the effort to re-establish the combination. The violence of such contests is the reaction from the arbitrary character of the com-

pacts, and has no more actual kindred with legitimate competition than the compacts themselves have.

A grave effect of this policy, though not easily calculable, is the ability it gives to railway officials to control the prices of stocks, and the temptation to enhance their fortunes by doing so. The unprecedented speculation which followed the inception of the pooling policy caused an advance in the value of railway securities to the amount of hundreds of millions of dollars; and it is an open secret that great fortunes were built up from 1877 to 1882 by bold speculation, relying upon the effect of the pooling policy upon the Wall Street valuations of railway property. Probably a correct estimate of the affection of railway men for the pooling policy would be reached by a comparison of the increase of the net railway earnings between 1877 and 1880, with the total advance in prices of stocks, and by the discovery that the actual gain of earnings was not a tithe of the speculative profits from the inflation produced by the pool. It is not alone in speculation for an advance that the power and knowledge of the railway in the pool can be used to individual advantage. How many of the disputes among the pooling railways, during the last three or four years, were really incited to make profitable speculations on the short side of stocks is of course beyond human knowledge; but if the actual number is one half of the number of assertions of this kind in the public press, the evil from this one source is greater than all the advantages of pooling. A dispute can be precipitated to affect the stock market far more easily than a pool can be reorganized for the same purpose. It takes the united action of all the leading officials of

the rival roads to form a pool; but a single traffic manager or general agent can, by the indirect and secret methods of which the history of pooling is so prolific, start a rivalry in rate-cutting that will make "bear" operations profitable. Such a man, if brought to account, can defend his action on the plea or suspicion that his rivals were cutting rates. It may be hoped and believed that the majority of railway men are superior to such temptations; but the nature of the case gives the unscrupulous man an advantage over others in being able to enrich himself by stirring up complications in the pool; while the legitimate interests of the shareholders suffer. It is a heavy indictment against the pooling system that it gives power to avaricious and unscrupulous men in railway management, to enrich themselves at the cost of shareholders and investors, both by forming combinations and by exciting disputes or ruptures in them.

These objections to pooling combinations are not fanciful, nor are they prompted by animosity towards the railway system. They rest upon public principles which are inherent and fundamental in our system of law, and have been applied in a long line of judicial decisions holding all such contracts to be against public policy and void. The illegality of agreements restraining trade and limiting competition was a well-established principle of jurisprudence before railways were thought of. "As far back as the reign of Henry V.," said the Supreme Court of Massachusetts, nearly half a century ago, "it was held as old and settled law that bonds in restraint of trade are void." It is further reported that when a bond of this sort was produced in court by the plaintiff's lawyer, the fifteenth-century judge flew into a

passion and declared in old law French, that "if the plaintiff was here, he should go to prison until he had paid a good round fine to the king for his pains, by G—." The early decisions in this country adopted the same principle. In Massachusetts, when the seller of a grocery store agreed not to start a new one within a certain distance, and when a contractor bound himself not to run a stage in opposition to the obligee, the contracts were sustained, "as of limited application and for a valid consideration." But it was insisted that in every such case a limited application and a valid consideration must be unmistakably shown.\* The distinction between such agreements and illegal contracts in restraint of trade was clearly drawn, in 1837, in the case of *Alger vs. Thatcher*, by the Supreme Court of Massachusetts.† This leading decision, made before the railways came into prominence in commerce, and defining the principles on which the law protects trade against artificial restraints by combinations and contracts, applies to the railway pools precisely as if written with them in view. It shows that the common law, from the first, forbade agreements to restrict the freedom of trade, that this principle has been preserved

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\* In *Pierce vs. Fuller* (8 Mass. 223), 1811, Judge Sedgwick said that "bonds to restrain trade in general are unquestionably bad, as tending to create a monopoly injurious to the public. . . . And if it does not appear whether the contract was made on good consideration, so that the contract may be either good or bad, it is the *prima facie* presumption of law that the contract is bad, because it is to the prejudice of trade and honest industry. . . . Therefore all contracts barely in restraint of trade, where no consideration is shown, are bad." But the court in this case sustained the contract as of limited influence and for a valid consideration. The report cites numerous authorities to show that in order that a contract in restraint of trade may be valid it must be "partial, reasonable, and for a valid consideration." Also 1 Pickering, 450, 3 Pickering, 188, and 6 Pickering, 208.

† 19 Pickering, 51.



by all enlightened jurisprudence; and is "universal in its application, salutary in its effect, and in accord with the spirit of our institutions." After stating, as objections to such contracts, that they injure the parties making them, by a surrender of their commercial rights, that they deprive the public of the full benefit of the extension of trade, and that they discourage the growth of enterprise and industry, the court almost prophetically added: "They expose the public to all the evils of monopoly. This is especially applicable to large corporations, who have the means, unless restrained by law, to exclude rivalry, monopolize business, and engross the market. Against evils like these, wise laws protect individuals and the public by declaring all such contracts void." When the mere agreement to abstain from a contingent competition in the iron-founding business called for the enunciation of legal principles like these, which have been recognized authority for forty-eight years, it is not surprising that the railways do not care to submit their pooling agreements to judicial criticism.

The illegality of all combinations to suspend competition has been affirmed by almost every court before which the question has been brought. By the Supreme Court of Ohio, a contract for a combination among salt-manufacturing companies was declared unlawful, in language which is strikingly applicable to railway pools.\* Still more emphatic was the language

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\* "The clear tendency of such an agreement is to establish a monopoly and to destroy competition in trade; and for that reason, on grounds of public policy, courts will not aid in its enforcement. It is no answer to say that competition in the salt trade was not in fact destroyed, or that the price of the commodity was not unreasonably advanced. Courts will not stop to inquire the degree of injury inflicted upon the public;



of the Supreme Court of Pennsylvania in declaring the illegality of an agreement between five coal-mining companies to fix the amount of each one's product, to bring the prices and sales under the control of the combination, to provide for payments in adjustment of the fixed proportions, and, in short, to apply the essential features of the pooling system to their business. This combination was declared, in terms much stronger than any yet quoted, to be unlawful and intolerable to the public interest.\* "Such a combination," said Judge Agnew, "is more than a contract: it is an offence;" and he cited a former eminent justice as authority for saying that, where the public is subjected to the power of confederates, "a combination is criminal." This view is further confirmed by the Court of Appeals of New York, in a case involving the precise methods of the railway pools, the chief difference being that the combination was less powerful, and the public interests affected were of less magnitude, than in any railway pool. The proprietors of boats on the New York canals formed a pool to regulate the rates of freight and passage; the profits were to be divided according to the number of boats operated by each, and members were forbidden to conduct business outside of the association. This miniature of the railway pool was held by the court to be "nothing less than the attainment of the exemption of the standard of freights, and the facilities and accommodations to be rendered to the public, from the wholesome influence of rivalry and competition."†

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it is enough to know that the inevitable tendency of such contracts is injurious to the public."—*Salt Company vs. Guthrie*, 35 Ohio State Reports, 672.

\* *Morris Run Coal Co. vs. Barclay Coal Co.*, 68 Pa. St. 173.

† *Stanten vs. Allen*, 5 Denio, 434; also *Hooker vs. Vandevater*, 4 Denio, 349.

This principle of the common law, laid down in England four hundred and sixty years ago, was announced by Coke,\* forcibly enunciated by a high American court before the railway system was created, and has been maintained, defined, and applied by a series of decisions in the federal and state courts, so that it is now easy to apply it to the prevailing practices of the railways. All that has been said concerning the illegality of contracts in restraint of trade applies with multiplied force to the railway pools. If such contracts are injurious to the public interests, when they affect but a single iron-manufacturing establishment, or combine a dozen salt companies, or five coal-mining organizations, or the carriers on a couple of canals, how much greater is the public necessity for the protection of law against them when the influence of a single pool controls the trade of half a dozen states, and its orders run from ocean to ocean? Every word quoted from the older decisions is a prophetic warning against the policy of combination which now rules the railway world. Every condemnation of pooling devices found in the later decisions is a judicial condemnation of the railway pools, and their existence is a defiance of the law and the courts.

The antagonism between the pools and the law is sharply defined by contrasting their practices in detail with the utterances of the higher courts on the subject. The primary object of these combinations is to raise the rates of freight, and the first means adopted is to suspend competition, and place the traffic under the exclusive control of the combination. The traffic is di-

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\* "A monopoly has three incidents mischievous to the public: 1, the raising of the price; 2, the commodity will not be as good; 3, the impoverishing of poor artificers."—*Davy vs. Allen*, 11 Coke, 384.

vided by fixed percentages; each member of the pool is limited to its allotted share of the business; in some cases the members of the pool are bound to abstain from certain classes of traffic, and in others the total volume of the traffic is limited in advance. Yet it is combination for these precise purposes that has been denounced by English decisions for four centuries, and forbidden by the American courts for the last half-century. Such contracts were declared by the Supreme Court of Massachusetts, in 1837, to expose the people to all the evils of monopoly: "And this is especially applicable to large corporations, who have the means, unless restrained by law, to exclude rivalry, monopolize business, and engross the market." Chief-justice Parker had previously declared, "Another reason is the great abuses these voluntary restraints are liable to; as, for instance, from corporations who are perpetually laboring for exclusive advantages."\* There is no reason why railways should be excepted from the application of these principles. The reasons on which the courts have based them have much greater cogency in railway transportation than in any other public interest. "This doctrine," said Justice Morton, "extends to all branches of trade and to all kinds of business. . . . It is founded on great principles of public policy, and carries out our constitutional prohibition of monopolies and exclusive privileges."

Some of the remarks upon pooling, in the preceding pages, may be regarded as extreme. But none of them are so severe as the judicial condemnation of exactly similar devices. The learned and conservative judges who have been called upon to determine whether such

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\* *Mitchell vs. Reynolds*, 1 P. Williams, 190.

combinations are lawful, have not been content to declare their injurious tendencies; they have denounced them as criminal offences and conspiracies against the public. "I take it," says Judge Gibson, "that a combination is criminal, wherever the act has a necessary tendency to prejudice the public or to oppress individuals, by unjustly subjecting them to the power of confederates."\* "Such a combination," says the Supreme Court of Pennsylvania (of a coal compact similar to the anthracite pool), "is more than a contract: it is an offence. . . . In all such combinations where the purpose is injurious or unlawful, the gist of the offence is conspiracy." It is not a defence, either to claim, as has been done by the pooling advocates, that the operations of the pools are only partially successful in suspending competition, or that their effect has not so far been unduly to raise rates. The mere fact of a combination to restrain free competition, whether its effect is moderate or extortionate, is enough to secure its condemnation by the courts. "It is no answer," says the Supreme Court of Ohio, "to say that competition in the salt trade was not destroyed, or that the price of the commodity was not unreasonably advanced. Courts will not stop to inquire as to the degree of injury inflicted on the public; it is enough to know that the inevitable tendency of such contracts is injurious to the public."

When the courts express themselves in terms of such severity concerning merely local combinations in the canal, coal, or salt interests, what burning words could be found adequate to express the judicial indignation at agreements which affect the price of trans-

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\* *Commonwealth of Pennsylvania vs. Carlisle*, Brightley, 40.



portation for the entire country and control the freight traffic of half a dozen states. Few judges have had occasion to make such a severe draft on the vocabulary of condemnation, for the pooling authorities have never allowed their combinations to be seriously tested in any court. The radical and decisive declarations by the courts, of the illegality of similar combinations, have given the railroads good reason to keep their agreements from the criticisms of any independent and impartial judge. Not only have the pooling railways abstained from asserting in the courts the legality of their contracts, but whenever those contracts have been a collateral issue in a suit, they have allowed it to pass practically without defence. The result has been that, while the decisions on similar cases are abundant and conclusive, those directly involving the railway agreements are very few. In England the subject was brought directly to a legal test by a suit to enjoin a pool representing two railroad companies, and the vice-chancellor declared the contract "so clearly and palpably illegal that I do not think the court ought to hesitate."\* In this country the question of railway pooling

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\* "An agreement that the profits and loss shall be brought into one common fund, and the net receipts divided into two shares of nine tenths and one tenth without the authority of Parliament, appeared to me so clearly and palpably illegal that I do not think the court ought to hesitate in its views in that respect; otherwise it might be that all the railways in the kingdom might be collected into one large joint-stock concern" (*Charlton vs. New Castle, etc., Railway Company*, 5 Jur. U. S. 1100). It is, indeed, claimed that the authority of Parliament has since been given to certain combinations of a similar character. But if so, the fact simply illustrates the power which capital can exert in that land of plutocracy and privilege. Further light is thrown upon this claim by the following extract from Mr. Glasscock's speech in the House of Representatives last winter: "Considerable has been said in the course of this debate concerning the English policy of railway amalgamations, and the



has been involved in four suits, all of which were, I believe, brought before the courts of the United States. In each of them the suit was against a member of the combination, brought to prevent the enforcement of some of the rules by which the pools are sustained, and in each the decision of the court was against the legality of the rules. One of these suits was between the Denver and New Orleans and the Atchison, Topeka, and Santa Fé railways. In this case the pooling agreement, by which the latter company refused to take passengers and freight from the former, on equal terms with those from the two other roads with which it was combined, was judicially characterized as a "conspiracy to grasp commerce and to suppress the building of railroads in two great states." \* The Delaware, Lackawanna, and Western Railway applied for protection by injunction against the order of the pooling

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impression has been conveyed, whether designedly or not, that in England pooling is recognized as lawful. Not so. On the contrary, whenever a pooling contract has come before the courts it has been declared void. The common-law doctrine, that all contracts between companies to pool their earnings and divide the profits on other than a natural basis are void, has been steadily adhered to, and is still the rule. One citation will answer for a dozen. There are two lines of railway between Rugby and Shrewsbury. These roads, as to competitive traffic, entered into a pooling contract. This contract came before the courts in the case of the Shrewsbury and Birmingham Railroad Company *vs.* The Northwestern Railroad Company (4 De G. & McN. 134), and was held unlawful, on the grounds that it provided for an alienation by one of these companies of a portion of its traffic to the other, and that it was against public policy."

\* 15 Fed. Rep. 650. In this decision, which was sustained by Judge McCrary, Judge Hallett made use of the following forcible language: "An association of carriers to regulate the price of freight, with provisions prohibiting the members from engaging in similar business out of the association, has a tendency to increase the price of carriage and to suppress competition, and is therefore illegal."

officials making higher rates upon its freight than on that of other roads, thus placing its traffic under the ban of the railway empire. Thus the issue more directly concerned the discrimination which the pool sought to enforce, than the public character of the pool itself. Whether the decision involved the illegality of the pool or only the illegality of its methods, it was very decidedly against the pool. The suit of the Continental Sugar Refining Company against the Chicago, Rock Island, and Pacific Railroad involved another of the practices by which the pools sustain themselves, that of diverting freight from the line designated by the shipper. The temporary injunction was granted, on the ground that the diversion could not be allowed against the wish of the shipper. The fact that the railways refrained from further contest was referred to by one of their organs as an evidence of their magnanimity.\* But their course was evidently prompted by other considerations. The maintenance of the pool was too important to be set at risk by appeal to a court whose decision would be final. While they acquiesced in the decision, as far as it affected the shipments of the plaintiff, they violated its principles, and maintained the practice it declared illegal, on the shipments of thousands of others. What their conduct showed, therefore, was not that the case was not,

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\* "A temporary injunction was granted, whereupon some anti-railway enthusiasts went so far as to claim that this complaint would be a death-blow to pools, confidently expecting the railway would contest the legality of the injunction and be conclusively overthrown. Rightly considering, however, that the importance of the case was not such as to warrant any protracted and expensive litigation, the Southwestern pool refrained from any decided opposition, and allowed the Boston concern to continue forwarding its sugar over the lines of the Chicago, Rock Island, and Pacific Railway."—*Railway World*.

as their organ said, of importance enough to warrant "protracted and expensive litigation," but that, however important the particular case might be, the principle which it involved was one of far greater importance; and they preferred quietly to accept defeat in this instance, rather than give an opportunity to the law to express itself authoritatively on their entire system of operation. They doubtless apprehended that if they contested this decision in the higher courts the suit might be, as "confidently expected," fatal to the pools. The matter was dropped by the railways in this case, as in all others which bring the question of pooling before the courts, simply because of the belief of the railway managers that to submit the validity of pooling agreements to the courts would be a death-blow to the pool.

Another pooling question recently came before the courts, which not only called out a sharp condemnation of pooling contracts, but suggests that the railway officers who have carried out some of their provisions occupy a rather perilous position before the criminal law. An agreement, in the common form of money pools, existed between the roads engaged in the transportation of coal from the Hocking Valley regions, by which one of them, conducting a large traffic, was to pay a considerable share of its earnings to other companies; a draft upon its life-blood which eventually sent it into the hands of a receiver. The receiver, after operating the road for some time, accumulated \$100,000 of earnings, which, by the terms of the agreement, was to go to the other pooling companies. Hesitating to make a gift of funds to the competitors of the road, while the bondholders were waiting for their interest,

he submitted the matter to the court which had appointed him, the District Court of the United States for Northern Ohio. Judge Baxter, with some of the indignation of the old fifteenth-century judge already referred to, ordered that he should "not only not pay out this money, but to pay no money whatever for any such purpose while the road is in the custody of this court," adding, "such contracts as these are no more to be respected by the law than any other gambling contracts." This was conclusive as regards the duty of a receiver; but how does his duty, in this respect, differ from that of the officers of a solvent corporation? One is trustee for the creditors of an insolvent concern, the others are trustees for the creditors and owners of a solvent concern. Both hold funds as trusts for certain purposes. It is clear that the receiver has no right to divert the earnings of the company from the payment of the bondholders, after it has defaulted on its interest. What right had the president and board of directors to make the same diversion of funds just before it defaulted? What is to prevent the creditors of this road, who are waiting for their money, from instituting proceedings for breach of trust against these officers, in paying out, for unauthorized purposes, money which should have been, but was not, applied to the payment of interest? What prevents the stockholders of any solvent railroad from instituting criminal proceedings against the officers who pay out funds, which have been fairly earned for dividends, to enrich rival companies who have earned less? It would be an unexpected and startling result of these devices for the improvement and elevation of the railway interest, if some of the respectable pooling officials should find



themselves lodged in the penitentiaries for breach of trust, criminal conspiracy, and embezzlement of railway funds.

With such uniform judicial condemnation of the principle upon which all pooling combinations are founded; with such a marked care on the part of the railways to keep their agreements from the scrutiny of the courts; and with so universal a condemnation of every feature and method of the pools that has been legally tested, is not every consideration of public interest and welfare that has been urged against this practice fully sustained by unquestionable authority? What an absolute and irreconcilable conflict there is between pooling and the principles of law may be seen from the fact, that a thorough review of the case by an able writer, who seems personally favorable to the idea of pooling combinations, leads him to declare that, in a legal point of view, "all of them are illegal, criminal conspiracies to suppress competition and establish monopolies."\* But apart from these authoritative decla-

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\* In the above argument on the legal aspects of pooling, the writer has drawn largely on the citation of authorities and the application of them in the case of the railway pools, given in a very able and exhaustive paper by Mr. Adelbert Hamilton, published in connection with his report of the *Denver and New Orleans vs. Denver and Rio Grande* case, and afterwards revised by him for the *Chicago Tribune*. Mr. Hamilton's examination of the subject leads him to express his conclusion on the illegality of pools in the following strong terms: "There is but one conclusion to be drawn from the study of the law on the railway pools. That is that they are unlawful. There is no difference in principle or reason between railway pools and pools of salt manufacturers, coal miners, or canal boatmen. All of them are illegal, criminal conspiracies to suppress competition and to establish monopolies. They are instruments of robbery and extortion. They belong in the same category of crime as a 'corner.' There is no difference between a corner in breadstuffs and a corner in the railways that carry the breadstuffs, except that the latter is



rations of the illegality of pooling agreements, it is plain that there is nothing in common between a system of laws designed to foster independent trade, and to protect the weak members of society against the strong, and a policy which combines powerful corporations created by the state into an organization mightier than the state itself; which directs the currents of trade, and fixes the price of services and commodities throughout the nation. If there had never been a word uttered from the bench on the public character of combinations to suppress competition and erect barriers between producers and consumers, they would still be evidently opposed to the public welfare, and at war with the enlightened policy of the law. Their growth in the last eight years, in spite of the decisive and universal condemnation of the courts, excites wonder at the blindness of the public, and its supineness in protecting its rights, as well as at the utter disregard of public policy and law by railway managers. It was forcibly declared, during the Congressional debates on the subject of railway regulation during the past winter, that the law forbids the combination of a few comparatively poor and insignificant canal boatmen to sustain their

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infinitely more pernicious and dangerous to the welfare of the people, because it is the greater and is at present almost permanent." Yet Mr. Hamilton's personal toleration for the idea of pooling is shown by the fact that, after this powerful denunciation of the illegality of pools, he expresses the opinion that they should be recognized and enforced by law! He founds this grave *non sequitur* upon the mistaken premise that "every abuse, every evil in railway management, has its root in competition." If this were so the outlook for the public welfare would be bad indeed. A better judgment of the case can be formed by recognizing the fact, which this work attempts to make plain, that all these abuses and evils arise from imperfect competition, and from the efforts of railway policy to suspend even the partial effects of that great remedial influence.

rates, but winks at exactly the same practice by the great and powerful railway corporations. The law makes no such discrimination, and if this question were brought before impartial and independent courts, the rulings already referred to show that whatever power the courts possess would be brought to bear against these combinations. Yet the practical effect is that, while the smaller combinations have been forbidden, and the details of the greater ones condemned, the power of the latter is such that they continue their operations without regard to law. A great public danger is disclosed in the ability of these immense corporations to nullify the principles of equity enunciated by the courts for centuries. The public welfare demands that this defiance of the fundamental law shall stop.

No less than the public welfare, the true interests of the railways demand that they shall cease to offend popular opinion and to alienate popular support, by maintaining these combinations against the freedom of trade. No property is more deeply interested in the favor of the public or in the stability of order than the railways. This country has already learned by experience that its entire railway system can be taken possession of by an organization of dissatisfied employees, and either be operated by them for weeks at a time, or utterly destroyed, as the moderation or desperation of the laboring element may dictate. The only safeguard against a repetition of the experiences of 1877, with perhaps still more disastrous results, lies in teaching the laboring classes that the operations of the railways contribute to their employment and sustenance. All thinking men know that the stoppage of railway opera-

tions, or the destruction of railway property, would be an infinite calamity, of which the direct results would fall upon labor. But hungry and idle working men with starving children do not always listen to the calm counsels of reason. The condition of trade and industry during last year should suggest the gravest reflections to all classes of business men, and more especially to the railway interests, which will be the first to suffer by disorder or revolt. Unemployed labor has been restless under the pressure of idleness and want. The apostles of anarchy have been openly sowing the seed of revolution and destruction. They have found their greatest support in the hardships produced by the existing constitution of trade. With grain so abundant and cheap in the great agricultural states that it has been burned for fuel; with all classes of manufactured goods produced in such excessive supply that the factories have had to shut down, the farmers of the West have been unable to buy goods, and the mechanics of the East have suffered for the lack of food. Writers on economic subjects tell us of overproduction; but when, in the midst of universal overproduction, or, in other words, excessive abundance, we find the presence of grim want, the only explanation left is in the presence of abnormal restraints upon the exchange of products. When too much grain, too much meat, too much iron, too much cloth, and too much coal is produced in the country, the fact that labor suffers from the lack of grain, meat, cloth, and coal, proves that there are barriers to trade between the producers.

The most prominent and most universal of these barriers are the railway pools. The combinations which

are formed with the purpose of raising the cost of exchanging the grain of the West for the goods of the East above the level that would be reached by the workings of competition; which restrict the production of fuel and sustain artificial prices to consumers, when thousands are freezing; which build up monopolies in the agents of light and heat; and which are everywhere imposing restrictions upon trade which create the paradox of general want in the presence of universal abundance, are offering the greatest provocation to violent and dangerous attacks upon the railway interest. Whether the popular feeling is provoked to express itself in adverse and extreme legislation, or whether the work of combination is perpetuated and extended until monopolies like the petroleum and coal pools become universal, and an exasperated and maddened proletariat tears the whole system down in general ruin, the evils of that policy will, if continued, eventually bring a revulsion beside which its questionable pecuniary gains will be as a mole-hill on the side of Himalaya. Not only in the interest of public justice and free competition should the railways abandon their present work of suspending competition and building up monopolies; but the instinct of self-preservation should lead them to restore the free and unrestricted working of the legitimate influences of trade. The abandonment or continuance of the pooling policy, as sketched in the preceding pages, may involve the safety or ruin of the entire railway interest of the nation.



## CHAPTER VII.

### THE FICTITIOUS ELEMENT IN RAILWAY POLICY.

THE public representatives and apologists of the railways have experienced a remarkable change of views since the agitation for railway reform began. The failure of voluntary combinations to destroy or control competition among the roads has suggested a demand for legislation to accomplish this end. A few years ago the advocates of these corporations unanimously insisted that legislation must not meddle with their business. The subject was so intricate, the traffic involved so vast and varied, and the business principles which controlled the railways so just and infallible, that the government must not, as one enthusiastic Congressman put it last winter, "lay the mailed hand of political power upon one of the most complicated and sensitive business adjustments of modern times." Until one year ago, this principle of non-interference had the unanimous support of the spokesmen of the railways. It is somewhat startling, therefore, to find them now, one after another, joining in the demand that, after all, legislation shall interfere with the railway business, shall legalize the pools, enforce their decrees, and so lend its aid to the suppression of free competition.

This change of policy is a result of experience in administering the pools. It has become plain that the laws of trade will revenge themselves, that competi-

tion will spring up, despite combinations to suppress it, and that the most successful pools lead to the building of new parallel roads and to violent and ruinous conflicts. But all this has not convinced the railway magnates of the wisdom of abandoning such devices. They choose rather to demand that legislation shall abandon its fundamental principle of protecting free competition, and support the railways in suppressing that influence, and in maintaining whatever arbitrary rates the railway combination shall decree. Their reasoning seems to be founded on the assumptions that the policy of the corporations is infallible; that the practice of pooling is the grand specific for all evils in the railway system; and that to preserve the public and the corporations alike from "unlicensed competition," to use the phrase of a prominent advocate of the corporations, the state must uphold combinations by law, and subject the business of the country to the railways, united in that grand federation of which Mr. Adams is the leading apostle. This principle, tentatively urged before the New York Railway Commission last winter, was more maturely and definitely presented to the Cullom Committee last summer. It is, in the words of Mr. Fink, that "Railroads should *be compelled* by law to organize themselves into associations for this purpose," *i. e.*, the purpose of establishing rates by pooling organizations such as Mr. Fink represented; and, while "not prepared to recommend a law" to compel the corporations, after they had entered upon an agreement in regard to rates, to keep it, he was "quite certain that such a law should be drafted and passed by the legislatures or by Congress." The same idea was explained in greater detail by Messrs. Geo. R. Blanchard,

W. K. Ackerman, and J. H. Devereux, in their arguments at various sittings of the Senate Committee. The latter attributed the evils of the railway system to the ravages of competition, drew a moving picture of the inability of the railways to earn dividends, and inferred that while competition might still be left free on the lakes, rivers, and canals, it must be restrained by law in railway traffic.\* The railway managers were, he acknowledged, powerless to curb this evil, "from an inherent weakness and defect in the disjointed and unguarded system of railway construction," which permits every one to build a railroad who has the capital, whether it suits the older corporations or not. In order to remedy these dangers to the railways, the only interest, as Mr. Devereux appears to think, which requires the protection of the state, he proposed legislation as follows: first, to restrict the building of new railroads, except upon the consent of a state tribunal or commission, which must, of course, be organized in the interest of the existing railways; and, second, to sanction the combination of railways to establish rates, to forbid any withdrawal from such an agreement once made, unless upon thirty days' notice, and to provide that "any person or persons who shall disregard such published rates, by allowing or conniving at any form of concession from such published rates, through drawbacks, commissions, or by any form of subterfuge whatsoever, *shall, upon conviction, be punished by fine, or im-*

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\* "But a competition that is wholly unrestrained will ultimately work in these matters a harvest of general disaster. Liberty is not license; competition may not be limitless. Competition should not be a freebooter in this matter, which enters into every material interest of the land, and affects the welfare of all people. Nor is competition to be permitted to run amuck in the destruction of vested capital."

*prisonment, or both.* This being the plan which the leading spokesmen of the railways propose for binding the commerce of the country to the chariots of the railway combinations, it is unnecessary to quote from men of less note.

Thus a wonderful and sudden transformation seems to have taken place, in the principles by which these corporations wish the state to be guided. Five years ago, Mr. G. T. Curtis held that neither Congress or the legislatures can "dictate the terms on which they [the railways] can be used, or prescribe the contracts which may be made with customers." Mr. Fink asserted that "the state cannot regulate tariffs," and that "neither Congress nor legislatures can fix a limit as to charges." As long as the regulation or limitation was to be in the interest of the people, all such governmental interference was unconstitutional and wrong. Those who urged such things were guilty of socialistic or communistic principles. But when the power of the government is invoked for the benefit of the railways, the constitutional principles of their advocates are reversed. The interference which would be intolerable, if made to protect commerce against extortion or favoritism on the part of the railways, is invited for the protection of the railways against themselves. To limit charges in the interest of the people is injustice and confiscation, but to limit them in the interest of the railways is benign and commendable. The public must trust to competition for protection; but to protect the railways from throwing away their own money, by carrying freight too low, the building of new railways must be forbidden, and the evil of unrestrained competition must be abolished. Competition will answer for the public



needs as long as the railways are able, by combination, to suspend and check it; but when it endangers their earnings the law must make such competition a criminal offence, punishable by fine and imprisonment. The technical knowledge and fairness of the railway managers, and their "enlightened selfishness," are sufficient safeguards for commerce; but the ruin with which they threaten their own interests is such that they appeal to the law to save them from it. The very methods which are condemned when proposed for the public protection, are urged in an exaggerated form for the furthering of railway combination. The long-and-short haul provision of the Reagan bill, and the requirement that rates shall be posted, were condemned as impracticable because they would prevent competition. But it is now proposed that the state shall join the railway in a far more direct attack on competition, while a proposition to enforce the posting of rates with sixfold more stringency, when urged by a railway president, becomes wise, conservative, and statesmanlike. The intricacy of the subject certainly seems appalling, when we listen to the authoritative expounders of railway policy, and learn that every rule proposed in the interest of shippers and of the public will work irretrievable injury; while similar or more rigid rules and restrictions, designed to hamper the freedom of transportation, to prevent competition, and to aid the railway managers in upholding charges, are safe and beneficial. Such contradictory arguments amount to a practical avowal that legislation has corporate aggrandisement for its chief end, to the disregard of public rights and interests. We are told that competition must not be protected by the law, when the railways

obstruct it; but that when it breaks its fetters and revenges itself upon the corporations which have tried to suppress it, the law must restrain it. What does this mean, but that the advocates of these corporations regard the interests of the railways as paramount, and the interests of the public as nothing?

What is the cause of this change of policy in railway statesmanship? To understand it clearly, we must examine it more in detail than it would otherwise deserve. The argument advanced by Mr. Devereux at length, and urged by Mr. Fink, Mr. Blanchard, and numerous other authorities of the railway school, rests upon two leading assertions:

First, that unlicensed competition is the source of discriminations which injure the public, and that these can be prevented by combinations of the railways to maintain uniform rates.

Second, that the railways are impoverished and ruined by competition, and ought to be restrained by law from thus wasting their resources.

From these premises the inference is, that relief for the public and the railways alike is to be obtained by laws which shall forbid the railways to cut rates, and shall restrict them to the tariff which shall be prescribed by the pools.

The assertion that discriminations are the result of competition is an error which is fully refuted in other chapters. It is enough here emphatically to deny that competition is their cause, and to add that, if it were so, the proposition to remedy them by combination would be absurd, since the most permanent and successful railroad combinations that have been known have inflicted the most persistent and unjustifiable discriminations.

The second assertion in question has a better foundation, and discloses the real cause of the desire to legalize combinations against the laws of trade. The railways have not earned enough; their failure is ascribed to competition; pooling contracts are looked to as an artificial support for earnings. Mr. Fink said before the Senate Committee: "There is very little complaint of excessive railway charges. Indeed, many railroads have been driven into bankruptcy, because their charges have been too low to pay expenses;" and he inferred the necessity of an artificial maintenance of rates. Mr. Blanchard "compared the ruin which has overtaken investors in railway property with the prosperity which has attended the farmers." Mr. Devereux drew a moving picture of the inability of his own road to earn fair dividends, and ascribed it to the steady reduction of rates through unbridled competition. This brings us to consider whether the average rates of the railways are unprofitable, and whether they, by rivalry, have reduced themselves to a condition that requires the fostering care of the nation, at the expense of other interests. The *prima-facie* case on the part of the railways was made out by Mr. Fink in his testimony before the Senate Committee of 1883. He said that, in the previous year, the capitalization of the railways was about \$7,000,000,000 and their net receipts about \$300,000,000, of which the stockholders received about \$100,000,000, or 3 per cent. on their stock. Applying his form of statement, but substituting the later figures for 1884, we find that the total of stock and funded debt of the railways at the close of that year was \$7,431,732,450. The net traffic earnings for the year were \$268,106,258, or 3.52 per cent. on the capitaliza-

tion. Of these earnings, \$176,694,302 were paid in interest on \$3,669,115,772 of funded debt, or 4.51 per cent., while the amount paid out in dividends was \$93,244,835, or 2.48 per cent. upon the stock. These figures, after allowing for the fact that they represent the traffic of an unprosperous year, do not indicate exorbitant earnings. But whether an interest that obtained  $3\frac{1}{2}$  per cent. on its total capitalization, during a period of general depression and bankruptcy, needs especial aid from the state may be considered hereafter. It must be conceded that these aggregates do not show the railways as a whole to be excessively remunerative. But the question that first arises is whether the bonds and stock on which these moderate returns are shown represent actual and *bona-fide* investments, or are in any degree fictitious. In other words, the argument in favor of artificially maintaining rates, because profits are low, brings up the subject of over-capitalization or stock-watering.

Does the capital on which Mr. Fink shows such very modest profits represent money actually invested in railways, or does it comprise a large share of alleged securities which represent nothing but paper? No man has, to my knowledge, seriously asserted that the entire stock and debt of the railways of the United States represent money actually invested. The nearest approach to such a claim was in Mr. Fink's remarks before the New York commission last winter, which he introduced by saying, "There is a great hue and cry about watering stock," adding that, as to the New York roads, with which the commission was then concerned, "there cannot be much water in that estimate of cost." Yet the leading railways of New York are notorious



and prominent instances of the practice of stock-watering. The New York Central and Hudson River Railroad, the most prominent of them, has a capital stock of \$89,428,300, and a debt of \$56,497,223, making, with mortgages of \$109,320 upon its real estate, an aggregate capitalization of \$146,034,853. The fictitious securities included in this total, as was shown by the New York legislative investigating committee in 1880, amount to a large percentage of the whole, and there is no more conspicuous example of capital inflated by stock dividends, under the pretence of consolidation. The stocks of the several roads which were united to form the New York Central were increased in the consolidation by \$8,894,560, or more than one third their original capitalization, which the legislative committee declares to have been "so much water or fictitious capital added to the road;" but this is reduced to commonplace, by contrast with the magnificent creation of financial values by the printing-press, when the consolidation of the New York Central and Hudson River Railroads took place in 1869, and a capitalization of \$90,000,000 was effected, which, as the secretary of that corporation testified before the committee, was "about twice the original capital" of the two companies. The fictitious addition is stated by the committee to reach \$53,507,060, which, considering that the \$8,894,000 of fictitious capital in the New York Central underwent the subsequent inflation of 27 per cent. on the second consolidation, is about \$2,000,000 within the mark. Without inquiring into the legitimacy of an increase of nearly \$17,000,000, which has taken place in the capitalization of this company since the investigation by the legislative committee, it appears from the figures

of the committee that, of the total capital of the New York Central and Hudson River Railroad, including stock and bonds, 36 per cent. is "water," while of the stock whose profits are under discussion the fictitious addition is 59 per cent. of its present total, or about 145 per cent. upon the original investment.

This remarkable manufacture of capital is rivalled, if not surpassed, in the well-known history of the Erie Railway. The remarkable story of successive issues of securities, representing little or no money or property, has been so graphically told by Mr. C. F. Adams that it need not be repeated here. It is sufficient for the present purpose to cite the conclusion of the New York legislative committee, from the testimony of experts, that the property of the company, capitalized at \$155,000,000,\* could be replaced for \$65,000,000; that the most moderate estimate of the actual "water" in its securities was \$53,163,881, not including a loss of \$10,800,000 by discounts in the sale of \$25,000,000 of bonds. The capital stock of the company is \$85,000,000, representing, according to this most moderate view, \$22,000,000 of actual investment; while others estimate that the bonded securities of the company alone represent the entire amount invested in the property, and \$10,000,000 more; so that the entire share capital and part of the bonds are a stupendous mixture of wind and water.† These two leading corporations of

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\* This was the capitalization in 1880, and has since been increased to \$160,601,385 by the issue of collateral trust bonds.

† "It matters little for the purposes of this report whether fifty or seventy millions, representing nothing save mismanagement, prodigality, and pilfering, have been injected into the capitalization of this road, and are now seeking to drain interest and dividends from the commerce of the country. In either case the wrong is equally glaring and the de-

New York are among the most important members of Mr. Fink's organization; together they issue more than \$300,000,000 of the securities in which the investors of the country are interested. In view of the fact that of the \$300,000,000 not less than \$116,000,000 are based solely on the *flat* of the corporations, representing no property whatever, and that, of the \$175,000,000 of capital stock of the two companies, 66 per cent. is fictitious and not more than 34 per cent. is genuine, it appears that Mr. Fink's assertion that "there cannot be much water" in the capital of these roads is not founded on a careful study of the facts.

In extending the inquiry to other railways it is not always easy to determine the exact amount of inflation in the capital. The great competitor of the two New York corporations, the Pennsylvania Railroad, is, apart from one or two stock dividends, supposed to be free from the burden of securities issued without a fair foundation in property. But the total stock and debt of this company, as represented to the public, are inflated in another way. The cost of the construction and equipment of its line is stated at \$75,000,000, which, when compared with the \$160,000,000, "estate of Erie Railway and construction account," and the \$114,800,000 for "roads and equipment" in the balance sheets of the New York Central, seems reasonable, and suggests a stock comparatively free from "water." But the difference between the cost of the line and the total capitalization of \$156,870,453 requires some explanation. We find it in the fact that the \$81,000,000 of stock in excess of the cost of the

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mand for a remedy equally imperative."—*Report of New York Legislative Committee*, p. 18.

road is balanced, together with a portion of the surplus, by an investment of \$96,000,000 in the stocks and bonds of other corporations having a par value of \$128,000,000. This practice of doubling the stocks or bonds which a railway corporation may purchase, by an additional issue of its own securities, is common enough, but has hardly been carried elsewhere to such a magnificent extent.

Whether or not it is proper, as a matter of account in the business, that a railway's capitalization should represent anything but construction and equipment, it is certain that, for the purpose of this inquiry, we should take nothing else into consideration as the basis of earnings. The low earnings of the railways, in proportion to their cost, is advanced as a reason for asking legislative aid in the artificial maintenance of rates. Yet here the total of railway capitalization is swelled by counting the stocks of certain corporations twice; the stocks and bonds which the Pennsylvania Railroad owns, comprised in the grand total of the railway capital, being reported by each company which issues them, and then represented again by \$81,000,000 of stock which it has issued, not as a railway builder but as an investor. It is plain that if this class of double entry is practised by many companies, on any such scale, it will account for a very large proportion of the total capital of the railways; and if the earnings are not also counted twice, the apparent percentage of net earnings on that part of the capital would be just half the real percentage.\* Thus the Pennsylvania Railroad

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\* Suppose a railway whose whole capital of \$10,000,000, earning 10 per cent. net, or \$1,000,000 annually, is bought by another company, which issues its own stock, representing this investment, to the amount



earned, in 1884, \$12,621,000, or apparently about 8 per cent. on the capital stock. But the cost of the roads and equipment which made these earnings was but \$75,000,000; \$81,000,000 of the capital being invested in other roads. On this \$75,000,000 the net earnings were 17 per cent., or more than twice the rate acknowledged by the company.\*

Such a device as this may easily be employed to conceal large profits, and for this purpose is the precise equivalent, in its effect upon the published statements, of fictitious issues of stock, or "watering." We may remark, in dismissing the subject of inflation in the stock of the trunk lines, that the Baltimore and Ohio Railroad, with its very reasonable capital of \$19,792,000 and bonded debt of \$23,959,000, stands in striking contrast to the inflated book-keeping capital of its competitors, however closely allied with them it may be in other practices no less questionable. But the inflation of capital has been practised on a large scale by roads in other lines of traffic; the most conspicuous case being that of the anthracite-coal roads, several of which have inflated their capitalization, by issuing stock or bonds to purchase other railways, or mining and manufacturing property, at an excessive valuation. The history of the anthracite-coal pool is reviewed

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of \$10,000,000. There is now \$20,000,000 of capital against this property, and the net earnings of \$1,000,000 annually may appear as 5 per cent. on the investment instead of 10 per cent., as they really are.

\* The difference between the actual cost of railroads and their equipment in the United States and their aggregate capitalization is estimated in "Poor's Manual" at \$700,000,000. The most charitable view is that the difference mainly represents such investments in the securities of other roads. As more than one tenth of the difference is accounted for in the figures of the Pennsylvania Railroad, the presumption is not violent.

elsewhere; but it is pertinent to the present discussion to point out that, in fourteen years, the Reading Railway increased its debt more than \$100,000,000 by the purchase of mining properties at inflated values; that the same company's debt, which, in many ways, is largely fictitious, includes \$25,568,000 of deferred income bonds for which it received but \$7,670,000; that out of the \$270,000,000 of capital of the four anthracite-coal roads, the cost of roads and equipment accounts for only \$114,000,000, the remaining \$156,000,000 being charged to investments in coal property, in the stock of other roads, and in various enterprises, and that investigation by legislative committees has proved that the total capitalization of railroad and mining property held by the members of this combination is not less than \$500,000,000. It has often been asserted, and is not, I believe, denied, that the stocks and debts of these railroads are fictitious to the full extent of one half of their aggregate. That the vast additional capital representing mining properties, upon which they have united to extort profits from the public, is inflated in an equal or greater proportion is beyond doubt. But, for the purpose of this discussion, we need not look beyond the illegitimate value in the capital stock and bonds of the roads themselves.

A still more notorious and flagrant example of stock inflation is that of the Pacific railroads. The public are familiar with the record of this creation of stupendous wealth, out of the loan of a government subsidy and the gift of an empire in land. It has been told by Mr. Charles Francis Adams, in detail and with an authority that is emphasized by his present position

at the head of one of the companies. The story of the Construction Company, the "Credit Mobilier," upon whose stock, the investment in which was nominal, the greater portion of the shares and debt of the Union Pacific Railway was distributed as dividends, is part of the record of national politics. It is also well known how the Central Pacific Railway was built. A company of capitalists, whose resources at the beginning of the enterprise were \$195,000, with the aid of loans from the city of Sacramento and Placer County to the extent of \$550,000, built enough road to draw \$848,000 from the United States Treasury as the subsidy for the first section, and by repeating the process constructed the entire road; with which, as a nucleus, they have now gathered a total capitalization of \$139,000,000. Similar illustrations might be found in the financial "ballooning" of the Northern Pacific, the Texas Pacific, and the Atlantic and Pacific; but an outline of the history of the two older corporations is sufficient for our present purpose. Their aggregate capital is \$120,000,000; their funded debt, apart from the government subsidy, is \$136,000,000; and the contribution of the United States to their construction was \$61,000,000, in the form of a loan, on which less than half the interest has been repaid by the companies. It is well known that, of this capitalization, the stock does not represent a dollar of actual investment; that a large portion of the debt was pocketed by the constructors of the roads in the shape of contracts, which they made with themselves, to build the tracks at two or three times the legitimate cost; that the roads were almost if not wholly paid for by the government subsidy; and that of the \$259,000,000 of ad-

ditional stock and bonds issued upon the properties, an estimate that one third represents invested cash will be too liberal. Let us, however, assume that ratio, as the average proportion of cash paid for securities issued in the work of railway construction, in the trans-Mississippi states and territories, on the authority of an eminent Congressional advocate of the railroad side of the question.\*

Another method of inflating railway securities, though much less notorious, deserves some attention. Mr. J. H. Devereux's recent argument before the Culom Committee, based the claim for legislative aid, in the work of sustaining artificial railway combinations, upon the small profits of railway property. He illustrated this with figures from his own road, showing that, while the stock and debt of the Cleveland, Columbus, Cincinnati, and Indianapolis Railroad was \$6,425,000 in 1867, the average net earnings were \$653,000; that in the next five years, after an increase of the stock to \$18,366,275 on mileage, increased from 188 to 391 miles, the net earnings averaged \$857,000; while in the next eleven years, the stock and debt being in-

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\* Hon. William Walter Phelps, one of the leading opponents of the Reagan bill in the House of Representatives, said, in a letter dated April 24, 1884, in answer to criticisms on Mr. Blaine's investment in Western railway securities:

"He negotiated for a block of the securities, which were divided, as usual in such enterprises, into three kinds—first-mortgage bonds, second-mortgage bonds, and stock. The price, I think, was 3 for 1. That is, the purchaser got first-mortgage bonds for his money, and an equal amount of second mortgage or land-grant bonds, and of stock thrown in as the basis of possible profits. . . . I went myself at this time into several adventures of the kind on that ratio, and have always understood that Senator — and his friends got their interest in the Burlington and Missouri road on the same basis of 3 for 1."



creased to \$22,286,000, the net earnings only averaged \$650,000 a year. This Mr. Devereux presented as an illustration of the disastrous results of competition; and it certainly has that appearance on its face. But he adroitly concealed the fact that while the capitalization per mile of his road, at the period when his comparison commenced, was \$33,000, the expansion of his lines, in the next five years, had afforded the opportunity of a still greater expansion of the stock and debt, making the capitalization nearly \$47,000 per mile; while eleven years later, at the end of 1883, when, as he says, the further enlargement of the capitalization was due "to having acquired, partly by ownership and partly by lease, 345½ miles of additional road," owned by the company, according to "Poor's Manual," the mileage was exactly what he states it to have been eleven years before, while the debt and stock had grown to the very large sum of \$57,000 per mile. Had Mr. Devereux stated this fact, his picture of the trials of his road might not have been so moving. Suppose that the capitalization, so largely increased during a period of decidedly cheap railway construction, had been kept down to the original average of \$33,000 per mile. The capitalization would then have been \$12,902,000 upon the increased mileage, on which the average net earnings of \$650,000 would have been more than 5 per cent.; not immense prosperity, but less disastrous than Mr. Devereux would have our legislators believe. Add to this the recent stock dividend of the Chicago and Northwestern Company, of 25 per cent. on \$37,000,000 capital, in which there was already estimated to be \$10,000,000 of water, and the case of the Wabash road on which a capitalization of

\$126,000,000 was formed, of which half is confessed to be fictitious, and it appears that the Middle States and the granger railroads are not free from this prevalent dropsy.

In conclusion, one more class of railway enterprises may be referred to in connection with this subject. In a recent paper Mr. Edward Atkinson asserts that "the elimination of what has been called watered stock and bonds" against which "the silly crusade of so-called anti-monopolists has been directed is in process of accomplishment by methods far more potent than any possible legislative acts," and that we "have reached the end of construction companies, speculative building, and of the issue of two, three, or four dollars of securities for every dollar actually paid." It is pleasant to be assured of this comfortable conclusion by so high an authority as Mr. Atkinson, if even his authority can destroy the force of certain conspicuous facts. Otherwise the extreme examples of this practice furnished by capitalists in the cases of the Nickel Plate, West Shore, and South Pennsylvania roads indicate that the evils of construction companies, speculative building, and the issue of several times the cost of the enterprise in securities, were never more rife than now. The three roads named were built when the cost of construction was lowest. They were projected by capitalists whose large resources should have enabled them to carry out their projects without floating fictitious securities. Yet these eminent representatives of railway finances overloaded their projects with many times their cost in stocks and bonds, in a manner that fairly rivals the achievements of the transcontinental corporations. The New York, St. Louis, and Chicago

company, by contracting with its own members to build the road for the bonded debt, created a capitalization of \$75,000,000, or \$148,000 per mile. Their project was called into existence by the fictitious profits of the trunk-line pool from 1877 to 1881; and by thus watering the stock, while building their road parallel to the Lake Shore railway, they were able to force upon the Vanderbilt roads a controlling interest in their shares at a depreciated price, but one which left them a vast profit. The New York, West Shore, and Buffalo Railway, a project paralleling the New York Central, also suggested by the temporary successes of the trunk-line pool, created a capitalization of \$49,000,000 of stock and \$70,000,000 of funded debt upon 498 miles of road, or \$221,000 of securities per mile. A contract with a construction company, composed of the projectors, at \$100,000 per mile for single track and \$200,000 per mile for double track, to be paid in stocks and bonds, is presumptive evidence of inflation; and the proportion of actual value to the total of capitalization was revealed by the offers of the construction company, in 1882 and 1883, to sell the securities of the company, with the stocks thrown in as a bonus, so that the cash returns would be from two thirds to less than half their face value. The President of the North River Construction Company declared, in a pamphlet, in 1883, that the cost of the work for which it received about \$75,000,000 in securities was \$34,160,000. This was intended to facilitate the sale of the construction company's shares; but with the issue of \$26,000,000 of securities to purchase an existing road included in the line, it showed the legitimate capitalization to be \$60,000,000. It will be a more liberal estimate than that

of the builders of the road to suppose that all the bonds represent a legitimate investment and that the stock is fictitious. The price placed upon the property, in its recent purchase by the New York Central, indicates that \$20,000,000 of the bonds are also regarded as water.

The South Pennsylvania Railroad project illustrates, in many striking features, the great railway abuses of the times. The projectors of this enterprise, in itself legitimate and desirable, had an offer to build and equip the road for \$10,000,000, and they planned a liberal inflation, by raising that sum on bonds and making the stock capital wholly fictitious. But the project fell into the hands of the Vanderbilt interest, and the plan was found to be wholly insufficient. The stock was placed at \$20,000,000 and the bonds at the same amount. A contract was made with a construction company, said to consist of Mr. Vanderbilt's clerks and brokers, to do for \$15,000,000 the work which a responsible contractor had offered to do for \$6,500,000. The \$15,000,000 were to be furnished by a syndicate of capitalists from New York, Cleveland, Philadelphia, and Pittsburgh, who were to receive for their subscriptions the \$40,000,000 of securities. It is now asserted on good authority that the sum of \$10,000,000 is an ample estimate of the legitimate investment represented by the \$40,000,000. Upon this basis of four dollars in capitalization for one of cost, the greatest railway capitalists of the country conducted this enterprise, until, in pursuance of a broader policy, they sold out to the Pennsylvania Railroad, deserting the men who had put their money into the project in good faith, to secure a competing line, that they might to establish the



monopoly of the New York Central and Pennsylvania roads over their respective districts.

We have thus glanced at fifteen of the important railroads, with reference to the issue of fictitious or duplicate stocks. They are leading lines, and their management includes the greatest magnates of railway finance. The largest railway stockholder of the land was the master-mind of two of these companies; the two next largest shareholders in the nation joined in inflating the stock of another. These instances comprise fair illustrations, from each class of railway traffic, including three trunk lines, four anthracite-coal roads, two transcontinental railways, three grain-carrying roads of the Western States, and three recent projects constructed or attempted when labor and materials were cheapest. When we find, upon a summary of the figures, that the total capitalization of these fifteen corporations is \$1,466,000,000, or more than one fifth of the entire railway capitalization of the nation, and that on their securities the lowest estimate of the fictitious element is \$596,000,000, or nearly one half, some conception is reached of the extent of this practice of inflation. When we call to mind the many roads that have been built on bonds throughout the West, often on bonds sold at three quarters or half their face value; when we reflect on Mr. William Walter Phelps's declaration that the practice of issuing in securities three times the amount of cash subscriptions is "the usual one" in trans-Mississippi projects; when we remember the hundreds of millions of securities issued in duplication of securities owned by the railway companies themselves; surely the estimate of "Poor's Manual," that the actual cost in money of all the railroads in

the United States in 1883 did not exceed their funded and floating debts, an aggregate of \$3,787,000,000, and that the fictitious capitalization was \$3,708,000,000, is moderate and conservative.\*

How does all this affect the public interests? Mr.

\*Mr. H.V. Poor estimates the actual cost of all the railways of the United States at \$30,000 per mile. When equipment is taken into consideration, this estimate must imply the partial scaling down of the cost towards the present low prices of labor and materials. This may seem severe on roads which were built at high prices; but Mr. Poor has too often been cited as a witness on the railway side of the case to allow any contradiction of his testimony at present; and the following extracts from his "Manual" for 1884 are conclusive as to the extent of stock watering: "The increase of share capital and indebtedness of all the companies for the three years ending December 31, 1883, was \$2,093,433.054, the cost of the new mileage, as represented by share capital and debt, being about \$70,000 per mile. The increase in the three years of the funded debts of all the companies was \$924,165,440; of their floating debts, \$169,880,406; of the two, \$1,094,045,846. It is not probable that the cost of the mileage constructed in the three years equalled the increase of funded and floating debts by at least the sum of \$200,000,000. The cost of the mileage constructed certainly did not exceed \$30,000 to the mile. The whole increase of the share capital, \$999,387,208, and a portion of the funded debt, was in excess of cost of construction.

"It is in this immense increase of fictitious capital that is to be found the cause of the general distrust which prevails, and the enormous decline in the price of railroad securities. From 1879 to near the close of 1883 a most singular delusion rested upon the public as to their value, and this delusion was taken advantage of on a vast scale by able and unscrupulous adventurers. Whatever was manufactured and put afloat was seized with avidity by an eager and uninformed public. The delusion was increased and prolonged by payments on a very large scale of interest and dividends from capital. In this delusion the most loud-mouthed and unscrupulous promoters usually had the greatest success. . . .

"If it be assumed that the cost in money of all the roads in operation in the United States in 1883 did not exceed, as it certainly did not, the amount of their funded and floating debts, \$3,787,410,728, the actual investment was a most profitable one. The net earnings for the year were \$336,911,884, a sum equalling about 9 per cent. on their cost. If the fictitious capital could be eliminated from their accounts, their success, as investments, would have no parallel."

Edward Atkinson and Mr. Fink insist that there has been an unnecessary outcry against "stock watering"; so that it is pertinent to ask whether this gigantic manufacture of purely paper values has any evil results. The instances cited show that securities in excess of cash investments are produced: (1), by stock dividends of prosperous companies, capitalizing what are called surplus earnings; (2), by issuing the securities of unprosperous roads, for which the companies receive only a portion of their face value; (3), by the purchase of other railways, of mining or manufacturing property, or of real estate, or by consolidation with other companies, paying for the property prices largely in excess of the real value, either in the capital stock of the company or in new securities; and (4), by the construction of railways under contracts by which the projectors, as a railway company, pay to themselves, as contractors, from two to four times the cost of the work in stocks and bonds, selling these to the public as they can. The first method usually involves a deception as to the percentage of profits which will be earned on the inflated stock, and is a more or less transparent fraud on investors as to the real value of their shares. The second is often excused by the necessities of companies, compelled to raise money on the best terms they can; but it is no less deceptive as to the actual investment, and is, by the secrecy which always attends it, more demoralizing than the open stock watering of the first method. The third is a conspiracy to cheat both the corporation and purchasers of its securities. The fourth is a conspiracy of the founders of the corporation to enrich themselves by robbing it, that, when they have ruined their corporation, they may sell out their

stocks and bonds before the swindle is discovered, and finally inflict the loss upon the investing public.

The effect of stock inflation upon the financial interests of investors is more direct and vast than its bearing upon the shipping interests of manufacturers, merchants, and producers. Although the latter is our special subject in this work, the importance of the former question warrants this sketch of the financial evils of fictitious values. In fine, this practice of creating securities in excess of actual values has, by one method or another, imposed upon investors a volume of fictitious stocks and bonds more than double the amount of the national debt. According to the estimate of the most widely acknowledged statistical authority upon railways, through the methods of sale or hypothecation, \$3,700,000,000 of purely paper values have been sold to the public. The creation of these fictitious securities has sometimes been so open and notorious that the successful sale of them seems to indicate eagerness to be cheated on the part of the public. In other cases the methods used have been so secret and so plausible that it has been almost impossible for the legitimate investor to detect them. In the end, the false values have been so mingled with the real, and the fraudulent investments made to bear so close a resemblance to the honest ones, that at the present time the greater part of the railway securities of this country are clouded by the suspicion of illegitimacy. In the presence of this mass of falsehoods and pretences, imitating real investments, it is not strange that a period of public credulity should be followed by a period of general suspicion, when none of these doubtful investments are trusted; but it is strange that another period of credulity should



come, allowing new inflations and fresh issues of fictitious capitalization. Suspicion is the natural and legitimate condition while such practices are possible. The gigantic wrong upon investors, perpetrated in the creation of this \$3,700,000,000 of fictitious railway investments, is one of the most serious and unanswerable counts in the indictment against the railway kings. Besides this imposition on the confidence of the public, the practice of stock inflation reacts disastrously upon legitimate railway interests. The loss which this wanton violation of public confidence inflicts upon the railways themselves, is apparent in the rate of interest which they must pay on their bonded debt. If the bonds of the railways were confined to one half the actual and honest cost of construction, they would be eagerly sought for at 4 per cent.; and in that case, \$72,000,000 would have sufficed to pay the interest charges in 1884. This would have left from the net earnings of that year \$196,000,000 as net profits instead of the \$91,000,000 realized under the rule of inflation; so that the second count in the indictment against stock inflation is that it has for several years inflicted an annual loss upon the honest shareholders of the railways exceeding a hundred millions a year.

Again, the inflation of railway capital is intimately connected with the artificial combinations, which seek to sustain rates and create fictitious prosperity, and which lead, now to rivalry and ruinous conflicts among the roads, and now, when the pools have been temporarily successful, to the construction of parallel lines to share the profits. In fact, the purpose and excuse of pooling are found in this vast volume of unwarranted capitalization. The object of the pools is to

earn dividends on the watered stock. Under competition they could earn a fair dividend on the legitimate investment; but when their stock and debt are doubled, the combinations are necessary to maintain rates which will yield a profitable return on the inflated aggregate. But when that result is attained, the violated laws of trade work out their own revenge. The prosperity of the lines under the pools stimulates the construction of new and parallel roads, either to share the profits of the pools, or to force the older corporations to buy them off. Against the \$500,000,000 of watered securities, on which the combination attempts to sustain rates, \$15,000,000 or \$25,000,000 can establish a new competing line, and the inducement to do so is vastly enhanced when, in addition to a share of the pooling profits, millions may be made by selling watered stocks to the investing public. The \$15,000,000 or \$25,000,000 required to construct the new road become \$40,000,000 or \$100,000,000 on paper. The "securities" (so called in irony) are thrown upon the market, at a price which yields the speculators a great profit. A conflict breaks out between the newer and older roads, which throws Wall Street into convulsions, makes the new investments of the confiding public nearly worthless, sets the great corporations at the work of cutting each other's throats and throwing away their own money, produces the wildest fluctuations in rates, surrounds legitimate business with the hazards of gambling, and plunges all the vast interests connected with railway transportation into uncertainty and apprehension. Throughout all this, the presence of fictitious values is at once the cause and weakness of the pools. It creates the demand for artificially enhanced

earnings; it exposes the older roads to danger from the competition of new capital; it gives fresh projectors a double resource in the prosecution of their enterprises; and so the evil grows, with no prospect before it but that it shall utterly destroy the public confidence which is its foundation, and collapse in general disaster.

Our last charge against the practice of over-capitalization is that it assists railway managers to manipulate the financial markets. It is unfortunate that the railway men, who have lamented, before investigating committees, the unremunerative character of railway investments, were not asked to explain the remarkable increase of personal wealth among railway managers, which has taken place during years unprofitable for shareholders. Of the seven great fortunes of the East, five have been made in railway management; of the eight on the Pacific coast, four are the result of the same business. Of these nine great railway capitalists, eight have been connected with the creation of fictitious securities and excessive capitalization, described in the preceding pages. Unscrupulous management can not only impose fictitious securities upon the public, but it can make enormous profits by artificially causing vast fluctuations in prices, to the hurt and demoralization of the financial world. By their agreement or their discord the managers can produce large advances or declines in the market value of railway securities. When the New York Central and the Pennsylvania railroads combined to establish their respective monopolies in New York and Pennsylvania, the gain to the Vanderbilt interest, by the advance in stocks, was greater than its entire investment in the property which it sold out. This is but one instance. The ad-

vance on railway investments succeeding the formation of the pool, from 1876 to 1879, has been estimated to exceed a thousand millions of dollars; the gain in dividends from that cause has not amounted to a tenth of that sum in all the succeeding years. The depreciation in railway values brought about by rivalry, by the weakness of watered capital, and by the efforts to enforce the combination policy, has been more than five hundred millions; the decrease in profits to shareholders has been less than 2 per cent. of that amount. Can there be a doubt, in the presence of such vast changes in market values, and such comparatively slight fluctuations in the actual results of railway operations, that a large share of the railway management of the nation has consoled itself for the misfortunes of stockholders, by accumulating private fortunes, the speculations being made safe and easy by prior knowledge of the combinations or quarrels which produced these results?

The financial freebooting which railway managers have the power to practise is a vast subject. Even the practice of stock watering and pooling seem to be surpassed by the achievement of a prominent railway adventurer, who, practically confessing the betrayal of his trust as President of the Erie Railway, restored \$9,000,000 of the diverted securities, and then made a profit of his shame, realizing, by the advance in Erie shares, more than the value of the stocks and bonds which he had returned to the corporation. If this is part of the history of the second railway shareholder of the nation, what doubt remains that many methods of enhancing their fortunes at the expense of the public, and of their own shareholders, are habitually practised by railway managers who value great wealth more than obscure



integrity? They have the power to transfer the money of investors to their own pockets, by the sale of inflated stocks and bonds, by contracts with themselves as construction companies, by forming combinations or declaring wars of rates to produce wide fluctuations in the stock market, by ruining subsidiary or rival lines, and by such practices as were described in former chapters—discriminations, contracts with fast freight lines, with eveners, stock-yards, transfer companies, and warehousemen; and whether the exercise of these powers is general or infrequent, the investing public needs protection as much as the shipping public. But in each case the danger is not, as the railway advocates insist, from unrestricted competition, but from the inflation of stocks, the policy of combination, and the entire absence of restraint upon reckless and dishonest management. But there is some reason for holding that investors, as a body, are largely responsible for the injuries they have suffered, and that their claim for legislative protection is less valid than that of the mercantile and manufacturing interests. Shippers have no resource against discriminations and the monopoly of transportation except the law; and if this fails them, they must surrender their business to the railway managers and their favorites. The investing public has, to some extent, a remedy in its own hands. Capitalists may refuse to invest in securities that are not above the suspicion of dishonest inflation; shareholders may forbid such practices, and depose every railway manager who attempts them; the bondholders of bankrupt corporations may reorganize them with a legitimate capitalization; in fine, the actual owners and purchasers of the railways have the power to protect their

property from spurious securities and fraudulent contracts. But while investors might, by common consent, find a remedy for these abuses, the duty of the law to interfere is no less clear. There is not much ground for sympathy with the victim of a confidence game, who parts with his money in the hope of illegal gain; but the law justly punishes the sharper who appeals to his dishonest cupidity. If the gigantic confidence game of issuing fiat railway securities has been aided by the cupidity or blindness of investors, they have been punished for it; but the powerful perpetrators of the fraud should not be left free to repeat it on new victims.

Many suggestions have been made for legislation to prevent stock watering and financial freebooting; and their detailed discussion is not necessary for the purposes of this work. But it is pertinent to point out that this evil, like discriminations and combinations, is possible only because of the unrestrained power of the railway managers. It would seem reasonable to ask that the law should impose restraint on the class which perpetrates these abuses, rather than on the class which has suffered from them. But we are confronted with a proposition that legislation shall abolish competition, and restrain the building of new railways; in other words, that it shall establish the managers, who have imposed these fictitious securities on the nation, in the full enjoyment of their profits, and restrain the freedom of the public which has been their victim. This would be a mockery of private rights and public justice. Let the law ordain that the stock and bonds of a corporation shall not exceed the true cost of its construction and equipment; that the funded debt of a railway shall not exceed half its total capitalization;

and that a railway sold under foreclosure shall be reorganized on the basis of the capital actually paid on such reorganization, and the unforced mortgages. These provisions, with the prohibition of the capitalization of surplus earnings, recommended by the New York Chamber of Commerce, and the uniformity and publicity of railway accounts shown to be necessary by Mr. Simon Sterne, in addition, would restrain the real abuses instead of rewarding the men who have committed them. The wild construction of railways, stimulated by pooling and facilitated by the practice of stock watering, can be prevented, by requiring that every dollar of stock or bonds issued by a new road shall represent a dollar invested. To enact that capital shall not be free to embark in a legitimate enterprise, without the approval of some official body, is to place the freedom of trade under the control of bureaucracy, and to set the claims to protection of the spurious railway issues above the freedom of honest capital. The duty of the law is to restrain abuses, and to leave legitimate investments open to all. By proper restrictions it can accomplish that result, insure security to the capital invested under its provisions, and if the issue of bonds is confined to half the actual investment on the property, raise that class of securities to a level of stability approximating that of government bonds.

It has been denied by Messrs. Fink, Atkinson, and Devereux, that over-capitalization affects commerce. They insist that competition fixes rates, and prevents watered stocks from earning dividends. But they destroy their own argument, by asking legal support for the policy of combination, on the ground that the railroads, under competition, cannot earn a fair return

upon their stock and bonds. It is the advocates of the railways then who introduce this question; for if the capitalization is not honest and real, their reasoning is valueless. Watered stocks are used to prove that the rates which will pay a profit on them, as if they were invested money, are reasonable rates. It is suggested that rates are too low, that the railways have done too much for the public, and now need aid from the law to obtain fair profits. Let us examine the facts. The earnings of the railways on their apparent capitalization last year were only 3.52 per cent., and for 1882, as stated by Mr. Fink to the Senate Committee on Labor and Education two years ago, 4 per cent. But this apparent capitalization, as we have seen, is about twice the real investment; so that the earnings are about twice as large a return upon the real capital as appears from the statement. Let us be more liberal to the railways than Mr. Poor, and assume that the railways of the nation actually cost \$4,000,000,000. On that sum the net earnings of \$268,000,000 amount to 6.7 per cent. If the cost were represented half by stock and half by bonds, the unquestioned security of the latter would make 4 per cent. an ample rate of interest, requiring \$80,000,000 of the net earnings. This would have left \$188,000,000 for dividends, or 9.4 per cent. upon the stock. In this view, the conditions of railway business do not seem to be so devoid of recompense as Messrs. Fink, Devereux, and Blanchard would have us believe. Mr. H. V. Poor, in reviewing the railway earnings for 1883, affirmed that "if the fictitious capital could be eliminated from their accounts, their success as investments would have no parallel." This remark applies with double force to the railway busi-



ness of 1884. In a year of great business failures and general depression, when business men were exceptionally fortunate if they were able to preserve their capital unimpaired; when the prices of agricultural products were so low that corn was burned for fuel in the West, and the market price of wheat in Europe would hardly pay the transportation charges from Kansas; when manufactories stood idle and artisans confronted starvation—in such a year as this the railway interest earned 6.7 per cent. on its actual cost, and, if its debt had been placed on a secure basis, would have yielded the shareholders 9.4 per cent. profit on their investment. Instead of the railways being in distress, they have been the most prosperous of the great investments of the time, and in the year of alleged disaster, when earnings and profits fell far below their former average, secured a return upon their cost which, as Mr. Poor says, “is unparalleled.” \*

The real purpose, then, of the efforts to legalize combination, is to obtain profits on fictitious capital by abolishing competition. Fictitious capitalization affects the interests of the public as shippers, mainly by affording at once the provocation and the excuse for an attack upon the principle of competition, by combining in pools to earn dividends on inflated capital. If

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\* It is not intended to assert that rates are unreasonably high; but to show the falsity of the claim that they are so ruinously low as to call for governmental interference. The average earnings of nearly seven per cent. on legitimate railway capital are not objected to by any sensible man, but the fact that the average rates conceal the abuses of discriminations. The case was succinctly stated by Mr. F. B. Thurber, before the Cullom Committee, as follows: “Rates as a whole on inter-state traffic are now lower than ever before, and in some cases unreasonably low, but in certain sections and on certain kinds of traffic rates are still excessive, and unjust discriminations pervade the entire system.”

the capital had been limited to the legitimate cost, there would be no excuse for arbitrary devices to affect rates; since even in a year when the pools were unsuccessful, and all other business was unprofitable, railway property earned a good average profit on a true valuation. The effort of the railway kings to destroy competition, after years of partial success, has of late, for a considerable period, entirely failed; and it is industriously taught, by advocates of the railways, that competition in railway traffic means ruin, and that the state must interfere to prevent it from wrecking the system. A railway president in the United States Senate gravely says to that eminent body,\* "the general rule that competition is best for the community and for the trade does not always work, and will frequently not work at all in railroading," and proceeds to support this denial of the laws of trade, by showing how railways will cut each other's throats in the effort to establish arbitrary rates, until their rivalry, sustained solely by the hope of obstructing competition, drives the weakest or the most highly watered corporation into bankruptcy. Another railway president tells the Senate Committee that "competition that is wholly unrestrained will ultimately work in this matter a harvest of general disaster;" and this idea, advanced by Senator Brown and Messrs. Devereux, Adams, Fink, Blanchard, Ackerman, and a score of others, is echoed by the railway journals. But the complaint against competition really means that it has done much to reduce the excessive inflation of railway values, and to bring them down nearer to the true standard of actual investment;

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\* Senator J. E. Brown's speech, Congressional Record, vol. xvi. pp. 875 and 876.

and that it has thus exposed the stock-watering practices of the railway magnates. It is ruinous and demoralizing, because, when the railways have earned fair profits, it has prevented them from levying, upon the business public, rates which will double these profits, and return high interest on their fictitious securities. And now, in order to defeat this influence, and make the imposition of the false railway capital on the business interests of the country completely successful, every organ of these corporations calls on the legislative power to legalize pools, and, as Mr. Fink puts it, to "compel" the railways to form associations for maintaining rates.

A similar course might be grateful to other depressed interests. Half of the blast furnaces have stood idle most of the last year, under the competition of works erected with improved appliances and at lower cost. The owners of these useless establishments would doubtless like to force their competitors, by law, into associations, to maintain such prices for iron that their obsolete stacks might go into operation; but railways would be the first to plead the interests of the public, as consumers of iron, against such conspiracies. The owners of houses might approve a scheme to suppress, by legislative aid, the competition for tenants, and so raise the rents of houses to twice the fair return for their actual cost. Such schemes are, of course, absurd and impossible, in branches of business open to indefinite numbers of private citizens; but in principle the policy supported by all the power of the great railway magnates is the same. The demand for protection of the railways against competition is no less a defiance of the laws of trade and of the common law, as well as of the constitutions of many states. Business interests

in general may meet adversity and depression as best they can; but the railways must be helped to increase an already exceptional prosperity by the utmost power of the law. Commerce is not only to be left to struggle against ordinary adversities, and the current railway abuses of discrimination, extortion, and monopoly, but it is to be bound hand and foot to the chariots of the railway kings and forced to bear the burden of an illegitimate valuation of \$3,700,000,000 on the railways; while legislation is to give its attention to the great work of confirming the corporations in their control of transportation, and of enabling them to extract from trade a revenue upon fictitious securities, amounting to two and a half times the national debt!

The project of authorizing the railways to join in one vast combination, to control transportation and abolish competition, will be accepted or rejected, as the nation is willing to make the railways absolute sovereigns of commerce, or chooses to preserve the independence of trade, and to assert the supremacy of popular rights. If personal and commercial integrity are to be maintained, and our political system freed from the domination of corporations, then the aim of legislation will be to restrain the corporations, to prevent all encroachment on public rights, and to maintain and extend the influence of competition, as the best agency for regulating their conduct and checking projects of inflation. So long as the public welfare, the preservation of justice and equality among citizens, and the prevention of the growth of privileged and favored classes are controlling principles in legislation, this spurious remedy will find no favor.



## CHAPTER VIII.

### COMPETITION AND COMBINATION.

THE policy of the railroads is to suppress the free action of economic law, denying the healthful influence of competition. This policy has certainly had an important influence in limiting competition, impairing its regulative power, and disturbing the natural work of economic laws. The question, therefore, arises, what these laws would accomplish if they were entirely unobstructed. What would be the effect upon the railway business, and upon its current abuses, if competition were as free and universal in it as it is in any other branch of trade?

Competition is intimately connected with discrimination in rates. Its presence or absence is the determining fact which forbids or permits the railways to burden the public with unequal and unjust rates. The presence of competition at one point, and its absence at another, produce all discriminations between localities. The practice of charging less for a long haul than a short one does not arise from any love of the railways for doing a greater service for less money, but from the fact that there is competition for freight for the longer distance and none for the shorter. The practice of charging "what the freight will bear" cannot stand before free competition for the carriage of such freight. If there is no competition, the decision of the railway

that freight from one mine or factory will bear a higher rate than that from a rival, is final. If competition is free, its effect is controlled by the common judgment of the competing roads as to what charge will yield them a fair return. The policy of the railway pool to suspend competition between rival routes, and, when necessary, to unite their forces to suppress it, shows how the railways appreciate its power and desire to abolish it. In all these respects, the presence or absence of free competition exerts an active and controlling influence in favor of impartiality in railway rates. The vast importance of this influence warrants an inquiry into its character and operations.

Competition, in commerce, is the rivalry of producers, merchants, and carriers; each of them striving to secure business by holding out superior inducements for the employment of his services. The superiority may be either in cheapness, or in the quality or the promptness of the service. But in any case the purpose of competition, in manufactures, trade, or transportation, is to secure patronage or custom by doing more for the same money than any rival. Thus competition seeks to increase profits by enlarging the volume of transactions, so that a small profit yields greater returns than a larger margin on a small volume of business. Its legitimate operation secures increased gains to active and intelligent enterprise. But the interests among which the railway methods have been prevalent seem to imagine that the old axiom, "competition is the life of trade," has been repealed by the modern conditions of commerce. No doubt it may be plausibly asserted that corporate influences have, in these times, destroyed much of the power of competition in commerce; but

the assertion that free competition has always produced the healthiest and most prosperous condition of trade remains indisputable. Yet the practical denial of it is so general, in the current combinations and pooling devices, that it is worth while to review some of the benefits which unhampered competition confers on commerce.

The first of these, already mentioned, is the expansion of commerce—competitors increasing their business by narrowing their margin of profits. In this respect there is no other power which can take its place. Except under the pressure of competition no man has the foresight to cut down his prices, so as to stimulate trade a hundredfold, thereby increasing profits tenfold. Again, competition offers such rewards for cheapening the cost of any product, that it powerfully stimulates all devices or inventions to accomplish that end. All plans for facilitating the operations of commerce, and all improvements in the character of manufactured products, are encouraged by competition and obstructed by the want of it. Under its sway manufactures seek the places best suited for economical production, and mercantile business centres where the distribution to customers will be most expeditious. Monopolies will locate such interests wherever whim or prescription may dictate. With competition, every invention for producing better or cheaper staples, all improved methods for transacting business, and every device for lessening cost are quickly seized upon, to secure the gains of enlarged business; without it all such improvements may be discarded or smothered by the prejudice or interest of those commanding the market. Under competition commerce is active, intelligent, strong, and independent;

without it commerce is inert, lifeless, stupid, and unhealthy. This is simply repeating truisms; but they must be made prominent when railway advocates suggest that free competition is an evil to be suspended or abolished.

There is similar occasion to reassert another principle which belongs to the alphabet of commercial science. Legitimate competition never requires the sale of merchandise or the performance of services at a loss. Mr. Fink, in his testimony before the Senate Committee in 1883, made a distinction between legitimate and ruinous competition. The distinction is important, although Mr. Fink's application of it is questionable. As the sole aim of competition is increased gains, by the expansion of business, the policy which expands business by reducing prices, so that every increase involves a greater loss, is not competition at all; and a little examination will show the nature of the difference. The man who gives away a horse or a barrel of sugar, to prevent his rival in trade from selling them, does not take counsel of competition. No merchant will attack his rivals by doing business at a loss, unless he hopes either to drive them out of business or to force them into a combination to sustain prices. Such ruinous rivalry is only resorted to where free and natural competition is impeded, or has so narrow a basis as to make combination or consolidation possible. It is a universal law that, in proportion as the basis of competition is broad and unlimited, the pushing of rivalry to the extent of loss is impossible. Take the case in which competition is most universal. The farmer has seven millions of competitors in this country in supplying the markets of the world with breadstuffs. Did



any one ever hear of a farmer cutting down the market price for grain, in order to prevent a rival from making a sale? In a city where there are a hundred merchants engaged in the same line of trade, it would be absurd for one of them to give away a quarter or a tenth of the cost of his goods, out of rivalry with his competitors. He will labor and scheme to bring his prices down to the lowest level consistent with a narrow margin of profit; but there he will stop. It is only where there are a few competitors that the policy of selling below cost is resorted to; and its purpose is invariably to force rivals out of trade, or into a combination to maintain artificial rates. The law of trade is that free and general competition always brings the price of commodities into the closest relation with their cost; and whatever instances may be cited of rivalry that has reduced prices below cost, it will invariably be found that it was not the result of legitimate competition, but was practised where competition was limited and obstructed for the purpose of suppressing it.

Notwithstanding the recent teachings of the railway advocates, these principles apply to transportation, as directly and forcibly as to any mercantile or manufacturing interest. In observing their application to the railway business, the first question is, how far the principle of competition prevails in railway operations. In the criticisms which have been made upon the railways, it has been very common to hear them called monopolies—a term which the defenders of the corporations pronounce demagogical and unjust, or, as one writer of more than ordinary courtesy put it, “produced by misinformation spread by the politicians and a portion of

the press." Whether there is truth in the charge of monopoly depends on the question, how fully the principle of competition is allowed to work in the conduct of railways, or how far it is disturbed or suspended. The character of the railway as a monopoly is very easily determined, by applying a standard furnished by one of the most extreme advocates of the present railway system.\* He declared that the railways are not monopolies, because they lack "that absolute and exclusive proprietorship which is the decisive criterion of monopoly." Absolute and exclusive proprietorship of any traffic being the decisive criterion of monopoly, it seems necessary to inquire how far it may be asserted of the railways, before confessing that it is unjust to call them "monopolies." It is certain that the railways practically have absolute and exclusive proprietorship of their tracks. The state having established a public highway, to be improved and operated by the railway corporation, the corporation has obtained a monopoly of transportation over that highway. It is as if a turnpike corporation were empowered to exclude all vehicles from its highway, save those which itself should furnish. Of the justice and legality of this exclusive and absolute proprietorship, discussion may be reserved for the future. It is sufficient to note, at this point, that under the present system every railway in the land possesses a monopoly in transportation over the line which the state has granted to it. The essence of a monopoly is its ability to prevent competition. The burdens which it lays on the public may be mild and easy, or may be onerous and grinding; but the essential nature of a monopoly is its ability, by whatever

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\* C. S. Patterson, *Princeton Review*, January, 1884.

means, to suppress or avoid competition in its business. In other words, *where there is no competition, there is either active or passive monopoly; where free competition exists, monopoly is impossible.*

There is no doubt that competition has an influence over railway policy and rates; but it is no less certain that, as railways are now managed, there are some important departments of traffic in which competition has no direct influence. The railways have no monopoly over transportation as a whole; but each railway has a monopoly over the transportation on its own line, and the attempt of the railways is to establish, by combining their exclusive privileges, a practical monopoly over all traffic that cannot advantageously take other routes. Every railway is free to do what it pleases with its local traffic. It may charge five times as much in proportion to distance as it does from competing points, as in the case of Winona and Memphis; it may assess upon the business any rate which, in its judgment or whim, "the freight will bear;" or it may charge to the local point the full rate for hauling it through the local station to the terminus of the road, and the local rate for hauling it back again, as has been done by both the Central and Northern Pacific roads. This local business, however small at each station, is vast in the aggregate. It is probable that, of all the railway traffic in the country, there is not five per cent. that does not, at some point, experience this absence of competition. The manufacturer whose works are located where two or more railways compete for his business, may not feel it on the shipment of his products; but the raw material from which the product is made, the coal, ore, pig-iron, or cotton, has felt it somewhere. The shipments

of grain from the Western cities often get the full benefit of competition; but the grain has suffered the effect of exclusive control at the local station where it was first shipped, and where the rate for carrying it a hundred or two miles, to the nearest competitive point, may be greater than the charge for carrying it from that competitive point to the seaboard, 1000 or 1200 miles away. The shipper who starts freight at local points has no check upon the absolute rule of the railway, save as it is influenced by considering what the freight will bear, or by the more remote apprehension that the competition of capital may construct a parallel line to share its business at way stations. Neither of these considerations has ever been known to prevent discrimination. The work of actually present or impending competition cannot be done by the expectation that it may arise in the future.

While competition is almost excluded from the vast volume of traffic at local points, its operation on all other business is suspended in proportion to the success and permanence of the pooling combinations, into which nearly every important railway in the country has entered. The pools have not been able to abolish competition altogether; and it is impossible to ascertain on what proportion of the railway traffic of the country they have at any time succeeded in suspending it. But we know that the union of the railways in pooling combinations has for its purpose the suspension of direct and natural competition between them. The instances in which these pools have been established on a firm basis, and have controlled the traffic pooled for a series of years, show their character and tendency. The petroleum-carrying pool, which built



up the Standard Oil Company; the anthracite pool, which has broken down independent shippers, and charges more for fuel, almost at the mouth of the mine, than two or three hundred miles away; the live-stock pool, which sustained the eveners' discrimination, and deprives the public of the economy in transporting dressed beef; the Pacific Railway pool, which maintains the "special contract" iniquity—all these show how the successful and permanent workings of pools abolish competition, and what abuses and evils follow when competition is abolished. One of the ablest attempts to represent competition as still regulating railway traffic was made in a magazine a year or two ago.\* It is valuable, not only for its proofs of the beneficial results of natural competition, but also as showing, in spite of the writer's indisposition to make the fact prominent, that the present railway system perpetually aims to hamper and obstruct every active form of its influence. He first points out how the competition of capital is felt in building new lines, whenever the profits of railways exceed those of other investments. If this is a regulative influence, what is to be said of the present policy of the railways to crush out, absorb, or buy off this form of competition whenever it becomes active? Nor does this writer observe how this remedy has often amounted simply to creating two tracks where one would suffice, without affording any relief against discrimination in local traffic. The aim of railway reform is not to restrict the earnings of capital, but mainly to prevent abuses and injustice, which are of no benefit to the capital. The competition

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\* "The Railway and the State," G. L. Lansing, *North American Review*, May, 1884.

of parallel lines and of water routes is pronounced by the same writer "the surest possible guarantee of the lowest rates and the best service." There is some truth in this, but the extraordinary instances of discrimination against localities, noticed in the early part of this work, have shown us that the competition of parallel routes only protects those directly reached, and imposes a burden on others. But does not the admission that this form of competition is important to the public interests amount to a confession that the efforts of railway managers for ten years past to suspend, by all means in their power, the competition of parallel railway lines, and, by their combined strength, to neutralize the competition of water transportation, are against public policy? If such competition is beneficial to the public interests, and affords "the surest possible guarantee" against excessive charges, can the banding together of all the important railways, wherever their contact would naturally produce competition, for the sole purpose of abolishing that guarantee, be less than a public danger?

We are next confronted with a fanciful theory, that "markets that are common to various points of production or supply control the rates from all these points, by the competition which may exist with any one of them. The lowest rate to the market by any one route controls the rates by all the routes." This is explained to mean that if any one of half a dozen places can, by commercial nearness, supply a market with merchandise at cheaper rates than other places, it is necessary for the railways to reduce rates to the other places, so that they shall be equal to all. This is so far from being true as a rule that, although some railway practices

might be cited to support it, we should hardly discuss it seriously, had it not been suggested also by Messrs. Fink and Atkinson. Having the support of their authority, it may be regarded as illustrating the prevailing tendency of the railways to ignore the cost of service as a consideration in freight rates. New York and Philadelphia can act as *entrepôts* for the agricultural interests of Ohio, at less cost for transportation than Charleston or Savannah, but this is no reason why the railways should attempt to put them all on an equality, by making the same rates to all. Nor can they do so, if the rates to the former ports bear any reasonable proportion to the cost of service. Mr. Lansing furnishes his own *reductio ad absurdum*, in the assertion that if the cost of production of grain were the same in Dakota as in Germany, the rate of freight on taking the products of the two countries to the English market would be the same. This is a surprising reversal of the relations of cause and effect. Why is the cost of producing grain less in Dakota than in Germany? Labor is dearer, the rate of interest on capital much higher, and the cost of implements no less. The one condition that enables Dakota to produce grain in competition with Germany is that land is cheaper. But why is the land cheaper? Simply because it is farther from market, and the cost of transporting its products to consumers is greater, so that the products are worth proportionately less. Mr. Lansing's proposition needs to be reversed. He should have said, that if the rate for transporting grain could be made the same from Dakota as from Germany, land would be as dear, and therefore the cost of production as high, in the Western States as in Europe. Certainly

the cost of transportation cannot be made the same, unless by violent interference with the laws of trade, such as is practised in some degree wherever this theory is applied. "The rates from Bristol, Liverpool, Cardiff, and Newport," says the manager of the Great Western Railway of England, as quoted by Mr. Lansing, "have to be fixed so as to enable them to compete with Gloucester." Not unless the competition rests on the natural basis of equal advantages. There is no obligation to do it on behalf of the stockholders, if the rates fall below the cost of service on the more circuitous routes, for that is simply throwing away the corporation's money. There is no obligation to do it on behalf of the public, for it is not the duty of the railway to bring Cardiff as near to Birmingham as Gloucester is. It is for the public advantage to have commerce transacted by the most direct and economical routes. Political economy abhors the waste of human effort in transporting merchandise a greater distance than is necessary, as much as nature abhors a vacuum. The theory of putting all markets on a dead level of equality, without regard to distance, can spring only from the vicious practice of disregarding the actual cost of service. Mr. Lansing's idea of the competition of markets as affecting railway rates involves, as a premise, the suspension of natural competition in transportation.

Mr. Lansing concludes his account of the work of competition among the railways by an important and useful statement, showing the extent to which earnings have been increased by the expansion of business, when competition has reduced rates.\* But he omits to state the

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\* Mr. Lansing compares the earnings of four trunk-line roads in 1875 and in 1880; and the earnings of the Central Pacific in 1877 and in



fact which is really the key to the whole discussion; that such reductions of rates are always the result of direct competition with other routes. This exposition

1882. In the case of the trunk lines, a reduction of 25 per cent. in the average rate brought an increase in tonnage of 69 per cent. and an increase in the net earnings per mile of road of 47 per cent. To the Central Pacific, a reduction of 33 per cent. in rates brought an increase in tonnage per mile of 47 per cent. The general operation of the principle can be shown more fully by a comparison extending over a time so long that the varying circumstances of successive years will be eliminated in the average results. For this purpose the following table is compiled from the reports in "Poor's Manual," giving for the Pennsylvania, the New York Central, and the Erie Railways, for four periods of five years each, their average rate per ton-mile, the aggregate tonnage carried one mile, the gross and net freight earnings, and the profits on freight per mile of road:

Mileage.	Rate per ton-mile.	Aggregate ton-mileage.	Gross freight earnings.	Net freight earnings.	Profit per mile.
1855-59.....1670	2.51 cts.	462,283,081	\$11,665,779	\$5,588,063	\$3460
1865-69.....2204	2.37 "	1,588,989,438	35,802,734	10,212,498	4417
1875-79.....2956	0.96 "	4,695,055,078	45,100,298	15,185,728	5092
1880-84.....3260	0.81 "	6,996,861,876	56,835,191	19,972,049	5965

Similar results are seen in the following summary of the rate, aggregate volume of freight, and gross earnings of the six leading Western railways, known as Granger roads, for the periods from 1870 to 1874 inclusive and 1880 to 1884, compiled from "Poor's Manual.":

	Rate per ton-mile.	Aggregate ton-mileage.	Gross earnings.
1870.....	2.42 cts.	1,234,678,291	\$29,919,953
1871.....	2.50 "	1,233,058,058	30,947,254
1872.....	2.53 "	1,337,038,063	31,074,669
1873.....	2.18 "	1,719,496,690	37,629,776
1874.....	2.16 "	1,851,645,824	40,004,035
Averages.....	2.36 cts.	1,477,183,381	\$33,715,138
1880.....	1.26 cts.	4,544,469,655	\$57,551,693
1881.....	1.42 "	4,435,202,005	63,007,765
1882.....	1.36 "	5,041,330,034	68,792,350
1883.....	1.30 "	5,768,173,429	75,564,744
1884.....	1.25 "	5,940,110,011	74,353,296
Averages.....	1.32 cts.	5,145,557,027	\$67,853,969

Thus it is a general law that the reduction of rates under competition gradually brings increased prosperity to the roads by the enlargement of business. In the case of the trunk lines this process, in twenty-five years, reduced the average rate by 68 per cent., but it expanded the net freight earnings per mile of road by 72 per cent. In the case of the Granger roads the reduction of the rate by 40 per cent. in a period of ten

of the true railway prosperity which comes from competition, is convincing, and is a valuable contribution to the discussion of the railway problem. Its value lies in the proof that only the pressure of competition brings this kind of prosperity to the railways. There may have been somewhere in the country, as Mr. Lansing seems to think, a railway board so liberal in its views that, without external pressure, it established for its traffic rates which in the first instance would be ruinous, solely in the expectation of enhanced earnings from the future increase of business. But such cases are certainly too rare to affect the general statement, that the policy of what is virtually the entire railway management of the country is to stop this reduction of rates by suspending competition, and that for this purpose pooling combinations have been formed embracing all the parallel and competing lines between the Sierra Nevadas and the Atlantic coast.

In this respect it cannot be said that railway companies are exceptionally short-sighted in their selfishness. No business man holding exclusive control of his trade will reduce his margin of profits for the sake of expanding his sales. However intelligent and far-

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years expanded gross earnings 100 per cent. These figures show that a reduction of rates, accomplished by economy in working the roads and by narrowing the margin of profits, brings its reward to the railroads in the increased volume of tonnage. In this case it is indisputable, as Mr. Lansing says, "that an increase in the profits of the railroad is not at the expense of the community, but is an accompaniment of the general increase of wealth which has been made possible by the lower rates of transportation." But it is also important to bear in mind that this is a very different kind of prosperity from that which the prevailing railway policy aims at, when it forms artificial obstacles to the reduction of rates, and establishes arbitrary tariffs, suspending the influence of competition, which has benefited the public and the railways alike.

sighted the merchant or manufacturer may be, or whatever his command of capital, it is not in ordinary commercial nature, working for present profit, willingly to surrender that profit in the hope of getting it back after many days. In every branch of trade and manufactures experience shows that the man who can keep up his prices will do so ; but it also shows that when competition does its work, reduction which would have been deemed ruinous, benefits, in the end, the trade itself, as well as the purchasing public. From roller-skates to railways, and from telephones to steel rails, this law has been demonstrated by experience, with the certainty of a proposition in geometry ; yet, in view of the practical ignorance of it often displayed, it might be termed the *pons asinorum* of commercial science. There is no reason to suppose that it needs any qualification in its application to the conduct of railways ; but the disposition of the railway world to obstruct its operation, demonstrates that the incentive to railway managers for the increase of their traffic, by the voluntary reduction of their rates, is not so strong that they can be expected to pursue this policy without the pressure of external competition.

These remarks do not detract from the value of Mr. Lansing's convincing demonstration, that the general reduction of rates caused by competition has rapidly developed the traffic of the railways and the resources of the country. With the comment that this enlarged railway policy is only produced by competition, it furnishes important aid towards the solution of the railway problem. It is a matter of the first importance that a reduction of from one fourth to one third in the average rates of leading railways during five years,

expanded their average net earnings more than forty per cent. It appears, therefore, that the direct and indirect forces of competition, already reviewed, have been so general as to exert a vast influence on railway management. It has made railway officials quick to perceive and adopt inventions for increasing their facilities or improving their service. It has made them active in measures that will enhance their business, and prompt in adopting new economies. More than this, wherever business has been reached by direct competition, it has forced a gradual reduction of rates, bringing with it a vast expansion of traffic, and benefiting alike the railways and the public. When all this is duly recognized, the fact remains that competition does not reach the local traffic; that it has been artificially and arbitrarily abolished by the few railway pools that have been successful for any considerable time, and that the prevalent policy of railways is further to limit or to abolish it. The good wrought by competition, wherever it reaches, proves the necessity for extending it to the traffic which it does not reach, and for resisting all efforts to abolish it. The dangerous forms of inequalities and injustice, which have been practised wherever it was suppressed, forbid that the power to suppress it by artificial combinations shall be extended or continued.

It is important to observe that, with the present tendency to combination, the rivalry which springs up between the railways, when the combinations are broken, is not legitimate and natural competition. The natural aim in competition is to secure increased gain by increased traffic; and the expansion of traffic on which every increase brings additional loss is utterly incon-



sistent with such an aim. In fact, under the present railway methods, such legitimate and healthful competition is unknown. Mr. Fink very properly draws the line between legitimate and ruinous competition; but he seems to take the ground that all competition between railways is of the ruinous variety. And it is true that under the influences which he, more than any other man, has helped to establish, the rivalry into which the railways enter, when any of them break away from the pools, seems to be as to which can make the most extreme and violent reductions in rates. But what is the reason of this? Are such eccentricities the fault of competition? The true reason is that one or more of the contending parties is striving to force the others to accede to its terms in the combination. The blame for this "cut-throat warfare" lies, not with the principle of competition, but with the policy of railway combination struggling for monopoly. When one railway strikes what is called "a decisive blow," by cutting down the freight rates from Denver to Chicago to twenty-five cents, or another enters a railway combat by putting the price of emigrant fare from New York or Philadelphia to Chicago or St. Louis at a dollar, it is not competition, but a means of enforcing combination. The purpose of such reductions is to impair or threaten the revenues of rival lines, until they come to terms, abolish competition, and establish another pool. The difference between the operation of the machinery of combination and that of legitimate competition appears in the violent and unnatural changes caused by one influence, and in the steady and gradual reduction which takes place under the other. One railway announces a reduction of one third on its tariff rates from

a competitive point. Its rival follows with a cut of one half; and the policy of destroying each other's revenue is kept up until one or the other is driven to terms. This is not competition, nor does it belong to the same class of economic causes. True competition, striving for gain by reducing the cost of service, is gradual and careful in its operation. The idea of striking off one half the freight charges at a single blow is inconsistent with the pursuit of profit, which is the motive in competition. Such a reduction admits but two possible explanations; either the railway which makes it is throwing away its stockholders' money to injure its rivals, or it has broken away from a combination which maintains excessive rates. In either case the extreme change is due to the influence of combination, past or prospective; and the wasteful strife arises from hostility to true competition.

This is no mere theory, but is the practical lesson of the contests which have impoverished stockholders and disturbed business for the past ten years. This must be emphatically insisted on, now that railway advocates are urging that competition threatens ruin to the railroads and must be stopped. It is time to check this persistent misrepresentation, and to fix it in the public mind that the railroads are suffering, not from competition, but from their self-chosen methods of forcing each other into combination. It may be shown that every railway war which has carried rates below cost clearly arose, not from competition, but from the effort to compel combinations or agreements, which would end it. One of the earliest contests that reduced freights from Chicago below the cost of service, was waged to force the Baltimore and Ohio Railroad to

abandon its differential rate from that city to Baltimore; the last one was a struggle to crush or prevent competition in the local traffic of the New York Central and Pennsylvania Railroads. Every one of the intervening conflicts had a similar origin. In all of them warring corporations have avowed their purpose to force their rivals to terms, in the combination which they are equally determined to establish, or to destroy the competition of the new roads. It is only when the question of regulation by the state is at issue, that these reckless struggles are represented as showing the evils of competition. Such a representation is idle and pointless. "Cut-throat warfare" has nothing in common with legitimate competition, although the superficial resemblance between them enables the misrepresentation to be plausibly made. All the loss and insolvency often ascribed to competition has come from conflicts undertaken in the interests of combination, as clearly as the chill comes from the same fever as the heat which follows it.

This is the character of nearly all the direct rivalry among railways in this country, since the policy of combination became prevalent; and Mr. Fink's statement of its ruinous effects applies to most of the history of the railways in late years. But this rivalry is not properly called competition. Why is it that natural and legitimate competition has been practically unknown among the railways for the past ten years? Mr. Fink disclosed the cause when he pointed out to the senate committee, in 1883, that combination among carriers on water routes is impracticable, because a small capital is enough to raise new competitors against any pool that may be established. Competition is free

on the lakes, rivers, and canals, because there are many competitors and their number is easily increased. Mr. Fink omitted to state that, among these competitors, the policy of throwing away one half of the prevailing rates for transportation at a single reduction is unknown. The carriers by water are not more intelligent and conservative men than railway officers; they are simply preserved by free competition from reckless rivalry. On the other hand, the possibility that the railway can, by just such rivalry, force its competitors to terms and secure the suspension of competition, incites it to ruinous warfare in rates. The rule holds good in all branches of business. One competitor among a hundred can never gain anything by cutting prices to half their cost; one among two or three may, by destroying the business of his rivals, force them, either out of business, or into combination with him at his dictation. Had there been so many competitors, in the East-bound railway traffic in Chicago, that any agreement on rates, beyond that naturally fixed by the cost of transportation, would have been impossible, no one would ever have conceived the notion of beginning a war of rates, because a new road undertook to charge four cents less on one hundred and forty miles less of transportation. If there had always been as many competitors in the railway business, at the leading centres of transportation, as there are in the lake traffic, the conflicts which have arisen between the lines would have been impossible, simply because the desired combination would have been evidently unattainable. These suicidal conflicts afford no argument against free and permanent competition, but they condemn the hampered competition and the policy of combination which



provoke them. To assert that these wasteful struggles prove the ruinous nature of competition, is the same sort of logic as to argue that, because a man suffering from alcoholism craves spirits, abstinence is an evil practice.

Such unnatural and expensive rivalry between the railways is harmful alike to the public and to the railways themselves. The effect of violent and unexpected changes in rates of transportation is to disturb legitimate business, and to introduce needless uncertainty into its operations; while to the railways it is wasteful and ruinous. In view of Mr. Fink's description of their disastrous character, I am unable to see how any railway official who engages in them can escape the charge of throwing away the money of the shareholders. No argument is needed, where one half or two thirds of the rates are cut off in a few days, to show that either the revenues of the corporation are recklessly thrown away or that the original rates were exorbitant. Either conclusion condemns, both the extravagant rate-cutting occasioned by the policy of combination, and the combinations themselves which are established by such means. These contests injure the railways more directly than does the success of the pools, when it stimulates the building of parallel lines, as shown in another chapter. But both together show the essential fact that the resort to such contests, for the sake of establishing combinations among railways, is an attack upon their true prosperity; while natural and legitimate competition secures it in the best and most permanent way.

No less important is the relation of competition to discriminations between individual shippers. In the

presence of active competition, any serious advantage given to a shipper is at the expense of the railway and not of other shippers. True, a railway manager may give an exceptionally low rate to a firm which he desires to foster; but competitors have their remedy in turning their shipments to rival routes. While competition operates freely among all the transportation agencies at any point, so that all are seeking to obtain freight by legitimate inducements, it is certain that rates will be brought down equally to a moderate margin above the cost of service. While the discriminating railway keeps its favors to *protégés* within that limit, other shippers can obtain the same advantages elsewhere. If the special rate, rebate, or drawback reduces the freight charge below the cost of service, that is, indeed, an advantage which competing roads are not obliged to give; but in that case the loss and burden must be borne, not by the rival shippers, but by the railway itself. This is a gross abuse; the fairly earned money of the stockholders is paid out to enrich the favorite of the railway manager; and both the public duty of equality and the private rights of the corporation are violated. But the most dangerous feature of favoritism is qualified, when the discriminating official cannot make up for reductions to one shipper by higher rates to others. Where the railway has exclusive control over transportation, it can practice effective discrimination, by maintaining high rates against the disfavored shippers. In the presence of free and legitimate competition by other routes, this power is lost. This is a principle of the utmost importance, as indicating a remedy for individual discriminations, that free competition at any point destroys the power of the rail-

way to impose the burden of its discriminations upon those against whom it discriminates, and allows it to maintain them only at a loss to itself. This fact not only limits the burden of the discrimination, but shows how to remove the entire abuse. Neither the railway corporation, nor the official, as an individual, can afford to show partiality or injustice in rates, where competition requires them to seek all the business they can get; and shippers, if treated unfairly, are free to take another route. Such a course will diminish its earnings, destroy its popularity, and strengthen its rivals. Here is the key to the whole problem. *Free competition makes vital discriminations impossible.*

It is true that there have been instances, at so-called competitive points, of the maintenance of special rates for the benefit of favored individuals or firms. But the general rule has asserted itself in such cases also, since, in each of them, the discrimination was made possible only by the combination of all the railways engaged in the traffic to suspend competition. Instead of the pooling practice preventing discriminations, as alleged by Mr. Fink and others, its most successful workings have been where the union of the railways upheld discriminations, which would have been impossible if competition had not been abolished. A signal instance of the suspension of competition by the pools, disclosing their relation to discriminations, is shown in the difference between the live-stock and grain-carrying rates from Chicago to the seaboard. The railway pool has never been able permanently to destroy competition in carrying grain. Its inability to control water routes, and the ability of grain shippers to hold back their freight for favorable rates by water, have rendered the

control of the combination over that traffic irregular and uncertain. No great and permanent discrimination, therefore, can be established by the railways between the grain shippers at Chicago. But the traffic in live-stock requires direct and immediate shipment. It cannot wait for the slower and cheaper water route, but must use the expeditious transportation of the railways. Hence the railways were able, for many years, to maintain a combination which gave notorious discriminations to the live-stock "eveners." The same principle, established by comparing hundreds of other cases under free competition, and under its suspension, may be expressed as the converse of the preceding proposition. *The suspension of competition by railway combination or monopoly renders discriminations possible.*

Reinforce these two propositions with the law, explained a few pages back, and the argument for competition is complete. Let it be seen that natural and legitimate competition secures the prosperity of the competitors, by enlarging the volume of their operations; that it prevents ruinous and extravagant reductions of rates; that the contests of the railways, during the last eight years, have been results of combination and not of competition, and that the transportation interests on the lakes, canals, and rivers, subject to exactly similar influences as the railways, except that competition is permanent and secure, are free from these violent and abnormal fluctuations of rates, and the inevitable conclusion is that natural and legitimate competition would have saved the railways from the evils which they have inflicted on themselves for nearly a decade. Suppose that competition in railway traffic



rested on as permanent and universal a basis as it does in lake transportation or in the dry-goods trade. Imagine that any one of five hundred or a thousand railway carriers could reach all shipping points, and perform the service at rates which competition would fix. Is it not evident that the rates would constantly bear a due relation to the cost of the service? Would any one of the thousand competitors ever conceive the policy of trying to secure all the traffic, by offering to carry it for half the cost? Or, if he did, what would he effect, save recklessly and wantonly to throw away his money, or that of the capitalists for whom he acts? A careful study of these considerations will prove that, if direct and free competition can be made permanent and impregnable on all classes of railway traffic, it will stop railway wars, preserve steady and remunerative rates, and confer an infinite benefit on the railway system, by the enlargement of the most profitable traffic. This establishes the third proposition: *Free and legitimate competition will secure the most lasting prosperity to the railways.\**

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\* Since the above pages were written Professor Hadley's work on "Railroad Transportation" has appeared, in which the author, while showing some appreciation of the abuses of the railway system, adopts the railway theory that competition between the railways will not bring rates into the proper and due relation to the cost of service, including a fair return on the permanent investment. He supports this plea by the usual illustration of the way in which railways will cut under each other's rates, until they are reduced to a ruinous level, without perceiving that all such rivalries are but methods to force the establishment of arbitrary combinations; and that if such combinations were impossible, the rivalry would cease at the point where further reductions would inflict loss. He endeavors to show that the investment of capital does not practically act as an element in fixing rates, from the oft-cited example of bankrupt railroads, which, as he, in common with many railway theorists, insists, are able to carry rivalry to a ruinous point without reference

These propositions point clearly to the true aim of all efforts to reform the railway system. To institute a reform for all time, the cause which produces the abuses must be dug up by the roots, the power to carry them out must be abolished, and the temptation to use that power must be removed. The cause of all these abuses is the irregularity or absence of competition in railway traffic; the power of the railway officials to perpetrate them lies in their ability, through imperfect competition, to maintain discriminations and

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to the necessity of earning any return on capital. It is true that, under the present system, the element of interest on capital, like other elements of cost, is disregarded. But to suppose that, under a system in which only natural competition was possible, the bankrupt roads would still discard the element of capital in fixing their rates, is to assume that no one owns the bankrupt roads. The fact is that, when a railroad passes out of the hands of the stockholders by bankruptcy, it becomes the property of the bondholders, and if they are allowed to manage their property, they will have the same interest in sustaining rates that the stockholders of a solvent road have. While combinations are allowed to use their power to freeze out weak roads, with a view to ultimate consolidation, they will be disturbing elements. But if combination is made impossible, the cost of service will be just as powerful an element in determining their rates as it is with solvent corporations or in any other class of business. Professor Hadley further supports the theory that, where there are "large permanent investments," competition will not stop at the point of loss, by the course of prices in pig-iron from 1873 to 1879. He says: "For a period of six years millions of tons of pig-iron were produced and sold below cost." The illustration has one fatal defect, and that is its incorrectness. The price of pig-iron during the period referred to was below cost for many furnaces that were old-fashioned or disadvantageously located, and such furnaces were forced to go out of blast. It was just about at cost for most of those which kept in operation; and the furnaces of the newest construction and most approved appliances made a slight margin of profit, even during the period of depression. Ricardo's theory, which Professor Hadley appears to think is disproved by this illustration, is confirmed by it. The works which could not produce iron at the market price went out of blast, and production fell so far below consumption as to produce a rapid rise of prices in 1879.

practice abuses; and the almost irresistible temptation lies in the vast wealth, which can be gained by manipulating rates in individual interests, and in the great pressure upon honest railway managers, under existing methods of business, to maintain abnormal and absurd discrepancies between the rates on local and those on competitive traffic. The permanent remedy lies in the restoration of full, free, and natural competition; and the aim of a thorough and lasting reform must be to establish competition so that it can never be overthrown. We must remove the causes of these evils, instead of simply prohibiting them, and leaving the causes to work, either in secret or open violation of the law. It is well to forbid a hungry man to steal; but it is not wise to leave him, while still hungry, in custody of food. The safest way is to remove both the temptation and the ability to commit the wrong.

This leads us to reverse the conclusion reached by the advocates of the combination theory, that the abuses of the railway system are produced by competition, and must be cured by combinations between the railways. They assume that the principle of natural and legitimate competition in trade does not apply to the railways; that, in the business of transporting freight over railways by steam, there is something peculiar and exceptional, which suspends the general principles of trade. But there is no reason for imagining that the fundamental laws of demand and supply, and the necessary consequences of them in the workings of competition, were repealed and overthrown by the discovery that steam could draw a load over an iron track. These laws are universal and unchangeable. The peculiarity of the railway system is that, while the mag-

nitude of its influence upon trade was not understood, it was allowed gradually to acquire the power to suspend or partly abolish the influence of competition. To the proposition to cure the abuses, arising from the imperfect and stifled condition of competition, by smothering it wholly and completely, the reply is that the remedy does not lie in that direction. If a doctor treats a fever by aggravating it, so that the patient presently dies, the fever is removed; the patient is not benefited. The abuses of discriminations, pools, and the manipulations which they produce, and of the violent and wasteful railway wars waged in the interest of combinations, cannot be remedied by handing over the business interests of the country, bound hand and foot, to the unrestrained sway of the influences which have produced such evils. The only natural and effectual reform must be in the revival of that unrestrained and legitimate competition, which has been practically unknown in railway management for many years, and the free workings of which would render all these abnormal and injurious features of railway business impossible.

“The best possible results to all will follow where there is the freest operation of the natural forces of competition.” This is the concluding sentence of Mr. Lansing’s article in the *North American Review*. He intended this assertion as a protest against interference with the railways by legislation. But, whatever the application, the statement is pregnant with truth. The free operation of competition will rectify the inequality of charging four times the rate to one point that is charged to another; it will prevent the building up of monopolies by railway rates; it will give



shippers a prompt and sure relief from discriminations adverse to their interests; it will forbid the improper application of the rule to charge "what the freight will bear;" it will place all persons on a practical equality, and make it necessary for carriers to treat all with impartiality; and, finally, it will abolish the vicious and dangerous forms of railway rivalry, by making the combinations at which they aim impossible. All the evils which have sprung from imperfect competition, and from the tendency towards combination which exists as a consequence, can be removed by fully re-establishing competition, and giving its forces as complete sway as they have in any normal and healthful department of trade.

How shall this natural and legitimate competition be restored, and established on a secure and permanent basis? What means are open to the republic, to bring its railway system under the same healthful and legitimate laws of trade as those which control lake and river transportation? If it can be shown how that great and beneficial reform can be effected, and the forces of competition be made supreme, not over a part, but over the whole of the railway traffic of the nation, the purpose of this work will be attained.

## CHAPTER IX.

### THE DISCUSSION OF REMEDIES.

WHILE it is beyond dispute that the state has the right to regulate the railways, and that, in some form, the exercise of this right is demanded by the general welfare, the question how to exercise it is difficult, and is not yet fully solved. The difficulty lies in finding methods of holding the great transporting agencies of commerce to their public obligations, without impairing their practical efficiency. This difficulty has indeed been exaggerated in the interests of the railways. And while the danger of interference with the vast railway interests, and of hampering their work, has been harped on as an objection to such legislation, the objection has been weakened by the greater danger of submitting to the present railway policy. Yet it must be fairly considered, and must have its due weight. In proposing measures to regulate the railways it should be borne in mind that the interests involved are vaster than were ever before the subject of commercial legislation. These interests are by no means those of the railway companies alone. The rights of the thousands of millions of railway property are important, but not more so than those of the tens of thousands of millions of private property and business capital that suffer for want of such legislation. The vastness of the interest concerned requires a cautious and thorough study of the

subject, not only by legislators, but by the whole people. But the magnitude of the lesser interest cannot be pleaded against the protection of the greater. The rights of both the railways and the people should be fully guarded; but the importance of caring for the welfare and prosperity of \$4,000,000,000 of railway investments is not greater than of securing the rights of \$30,000,000,000 of the property of the people.

It is clear that legislation which would hamper or destroy the free operation of the railways would be a public misfortune. What is wanted in the interest of the people is greater freedom in the use of the railways. One serious charge against the prevalent railway policy is that their own acts have restricted their operations. It may be doubted whether any legislation, which is seriously proposed, would hamper their freedom nearly so much as do their own pooling combinations. It is a strong commentary upon the position of their advocates that, at the very time when they are warning the public not to hamper the free operations of the railways by legislation, their united efforts are exerted to restrict their freedom by mutual agreement; and they are seeking for legislation to enable them to make the restriction complete and permanent. It is public policy to make the railways free in their operation under the workings of natural competition; and this is just the opposite of the prevailing railway policy. Legislation to secure the public rights should stop only the exercise of dangerous and illegal powers; and its main purpose should be to extend and secure that freedom in the use of the railways which is essential to their function as public highways.

With regard to the legislative power which should

be exerted to secure this purpose, it is necessary to distinguish briefly between the province of the nation and that of the state. It is conceded that the operations of a railway which lies within a state are solely under the power of that state. Most of the railways are chartered by the state in which they operate; they have obtained their right of way by the exercise of the sovereign power of that state; and within its borders they are, under our constitutional law, subject to its legislation. But when, as most important railways do, they carry on their operations from one state to another, they become highways of inter-state commerce, and are subject to regulation by Congress under the national constitution. The assertion of this right of Congress has, within the last three or four years, been stigmatized as a new claim. One eminent representative of a leading railway has attempted to show, before a Congressional committee, that Congress has no power to regulate the railways; but his position was clearly shown to be untenable by the authorities cited in the subsequent debates.\* But this power was asserted on behalf of the railways, before the demand for national regulation arose. In the Granger cases, the attempt of a state to regulate traffic beyond its respective borders was declared by the railway counsel to be unconstitutional, because Congress alone could regulate inter-state commerce. None of the great constitu-

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\* The judicial declarations of the power of Congress over the regulation of inter-state commerce were set forth clearly and exhaustively in the debates of last winter. They cannot be repeated in this work; but those who wish to refer to them can find them properly presented, either in the speech of Mr. Barksdale in the House (Congressional Record, 48th Congress, vol. xvi. p. 170), or that of Mr. Kenna in the Senate (*ibid.* p. 1429).



tional lawyers engaged in those cases, whether as counsel or judges, questioned this power of the nation; but the decision of the Supreme Court recognized greater power in the states than had sometimes been thought consistent with the control of inter-state commerce by the nation. While the chief justice's decision incidentally recognized the power of Congress to treat the subject of inter-state commerce as a whole, he also upheld the power of any state, in the absence of national legislation, to regulate such traffic as affects its citizens, whether the transportation extends beyond the state or not. This practically leaves the whole subject under the control of united legislation by all the states. All railway traffic either originates or terminates with one state or another. If all the states in the Union should pass uniform legislation to regulate railway traffic, none of it could evade these laws on the plea that it is inter-state commerce. That all the states will take such action is improbable. On the other hand, effective and thorough regulation by Congress would practically reach the same result. There is, indeed, a large amount of railway traffic that does not cross a state line. But it is upon that which traverses two or more states that the most serious abuses are practised. If such traffic were fully subordinated to public rights, the wrongs of traffic within state limits would be comparatively of slight importance. Let discriminations, combinations, and favoritism be made impossible on inter-state traffic, and they will not be maintained to any great extent on the remnant of the railway business.

It will be seen, therefore, that either national legislation, or the general action of the states, will be ade-

quate to reach the case if wisely drawn. But it should also be borne in mind that the influence which produces such action from one power will be sure to produce it from another. If the popular demand forces legislation in the states to restrain railway abuses or wholly to sweep them away, the same cause will obtain similar legislation from the national authority. Public intelligence and the public will must eventually compel practically uniform legislation, by the state and the national legislatures alike. Indeed, the measures already introduced in Congress and in the state legislatures, and passed in some of the latter, have possessed the same leading characteristics. It may be confidently predicted that whatever legislation public opinion may extort from Congress will be substantially adopted, under the same influence, in most of the states.

But, in view of the legal principles already explained, it may be asked why the common law does not protect the public sufficiently. The question is pertinent, but is answered by the experience of the last ten years. The common law is sufficient in theory; but it has failed in practice. The decisions forbid discrimination, even for the benefit of the connecting lines of the railway concerned; affirm the right of all persons to equal privileges, even if they are rivals of the railway in the transportation business; deny that the largest shipper is entitled to the lowest rates; they vigorously denounce pooling, and its attendant practices of diverting freight from subordinate roads and discriminating against them are declared illegal and subversive of justice. But pooling is nevertheless the universal policy of the railways; discriminations are maintained, both to turn freight to connecting roads and to keep it from

rival roads; favors have been granted in rates sufficient to determine the control of the trade, and thus the fundamental rules of the common law have been nullified by the railways. One branch of business has escaped them, and this exception is significant as explaining why the common law fails to protect the public. The express companies, after a hard fight, have fully established their right to compete in their business upon any railway in the United States. The fact that none but corporations, almost equal in financial strength to the railways themselves, are able to assert rights which, in our political system, belong to all, may teach us why exactly these rights in the case of private citizens are overridden with impunity.

In practice, legal remedies against railway injustice can be applied through the courts, only by fighting the railways at such disadvantages that the ordinary business man will never undertake it except in desperate cases. Every advantage of strength and position is with the railways. In the first place, the business man may suffer from discriminations long before he has any evidence of the fact. Finding his rivals underselling him in distant markets, and his own business dwindling, he may suspect that this is the work of railway favoritism. But the burden of proof is on him, if he seeks a legal remedy, and the fact that his favored competitor is able to crowd him out of business does not prove his case. The common law permits a man to sell his merchandise at a loss if he chooses, and will not assume that the cost of a product has not been reduced by new economies to unprecedented cheapness. If he succeeds in proving the discrimination, he still has an antagonist of boundless re-

sources, which, if really discriminating against him, will resort to delays, technical objections, and even corruption to defeat him. The merchant or manufacturer is commonly deterred by such a prospect from entering into litigation with a great corporation. But suppose that he overcomes these difficulties, what does he gain? First, he can obtain an injunction, directing the railway to discontinue its injustice. This might be of value, but that a new injunction, with new difficulties, is required to meet every subterfuge by which the railway will attempt secretly to evade the order. Then the litigant may obtain as damages the excess which he can prove that he has paid, above the rates allowed to the most favored shippers. Such damages are utterly inadequate. On the one hand, the plaintiff cannot hope to prove in detail a tithe of the instances of discrimination which have been practised. On the other hand, the amount of overcharges, even if they were all legally proved, is not a fair measure of the damage done. In such cases his greatest loss is in the restriction of his business, just as the main profit of the favored shipper lies in his power to expand his trade by underselling his rivals. Thus Messrs. Scofield, Schurmer & Teagle obtained last year a verdict for \$5000 for the excess of charges on 50,000 barrels of petroleum. But for the discriminations against them, they might have sold 200,000 or 300,000 barrels; while, by discriminations in its favor, their great rival, the Standard Oil Company, was enabled to sell 5,000,000 barrels or more. The damages in this case would pay but a part of the plaintiff's legal expenses, while the Standard Oil Company could well afford to reimburse the railways for such verdicts every month in



the year, for the maintenance of its monopoly. With such odds against him, the private litigant, who seeks justice from these corporations, may read over the courts the inscription which Dante found upon the portals of hell, "Leave all hope, ye who enter here."\*

Finally, the business man is well aware that, if he bring such a suit he will arouse the enmity of the power whose friendship is the first condition of his success. If he overthrows one form of injustice by a lawsuit, he will soon be confronted with another, demanding further litigation. There is no end to the ruinous forms the contest may assume. He may be obstructed and injured in ways which afford no tangible ground for legal proceedings. The side-tracks from which his freight is shipped may get out of repair; a remarkable scarcity of cars may occur just when he is

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\* "The damage in these cases of secret discrimination is not merely the difference between rates, but it goes deeper than that, and does an injury of a subtle character difficult of analysis, and under the rules of evidence still more difficult of a specific pecuniary computation. In the Baltimore case which I have cited, there was complaint that the plaintiffs' business had been injured, and the plaintiffs offered to show that a difference of two cents on the hundred pounds of sugar was not only a considerable loss of profit in such transactions, but that a competitor in business, enjoying this discriminating rate, would gradually absorb the business and drive his rivals out of the market. But the court held that this evidence was too remote, and refused the offer. Now, suppose that this discriminating rate had been lower still, it is a matter of demonstration that the business of the plaintiffs might have been utterly destroyed, and yet, under the rule of damage laid down, all that they could recover would be the actual difference between rates. Again, systematic discrimination of this sort is necessarily a corrupt act. It is not bestowed without some corresponding advantage to the donor."—Hon. J. V. Findley, *Congressional Record*, 48th Congress, vol. xvi. p. 111. Mr. Findley might have added that, under this rule, the more completely discrimination restricts the business of the plaintiff, the less damages he can recover, until, if he has been completely shut out from the market, he can recover nothing at all, because he has made no shipment.

ready to make large shipments; or when the freight is under way, the mysterious dispensations of railway providence may cause it to encounter a blockade, from which it will be extricated weeks after it should have been delivered to the consignee. All these dangers and discouragements are well understood by business men. It is a practical maxim among them that to quarrel with the railways is commercial suicide. In the general opinion of merchants and manufacturers, as shown by their acts, it is better to accept such share of business prosperity as the railways will allow them, than to defy the railways by invoking the protection of the law against them. This may not be manly or independent. It has already been remarked that the worst result of corporate supremacy is the demoralization and cowardice which it produces among business men. It is, however, a prominent fact in the problem, and at once proves the necessity of thorough reform, and explains the insufficiency of legal remedies.

Much the same may be said of the constitutional provisions against railway abuses, which have been referred to in another chapter. It is a humiliating confession to make, but one which shows the magnitude of the power with which legislation must measure its strength, that the constitutional prohibitions of a dozen states, traversed by great railway lines, against discriminations, rebates, the consolidation of competing lines, the granting of free passes, and other practices, are practically waste paper. The constitutions of California and Pennsylvania are striking illustrations. Their language is clear and strong enough, if enforced, to prevent nine tenths of the abuses which unregulated railways practise. Yet, in California, the rule of the

Central Pacific Railway over commerce is unchecked, the commissioners provided for in the constitution are expensive figure-heads, and the constitution, as a restraint upon that great corporation, is a dead letter. In Pennsylvania a similar result has been obtained, by the success of the Pennsylvania Railroad in preventing legislation to give effect to the constitution. Last winter a bill, designed solely to carry out its provisions, was opposed by assertions that these provisions are impracticable, and was defeated. It has even been seriously claimed that, because the Pennsylvania Railroad obtained its charter before the adoption of the present constitution, it is free from the restrictions of the fundamental law.\* It is in arrogant assumption of this immunity that the Pennsylvania Railroad has now bought off the competition of the South Pennsylvania, in defiance of the constitutional prohibition of the purchase or consolidation of competing lines. A similar weakness of unsupported constitutional law, against the might of the railway system, is found, to a greater or less degree, in nearly all of the states whose constitutional provisions on this subject were collated in Judge Reagan's argument last winter.†

The measures suggested to do away with the railroad

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\* "If you will look at the Constitution of the State of Pennsylvania, as amended in 1873, you will find in the 17th section a series of provisions which, if carried out and enforced, would be amply sufficient. But the railroad men and their advocates have managed to impress the legislature with the idea that they are above the constitution. They assert that every restriction imposed upon them in the interests of justice, equity, and fair dealing is a violation of the charter embodied in their contract. All this is no doubt very false doctrine, but they contrive in some way (I really do not know how) to make the state authorities accept it as true."—*Judge Black's letter to New York Chamber of Commerce*, Nov. 16th, 1880.

† *Congressional Record*, vol. xvi. p. 309.

wrongs may be classed under three heads: (1), ownership and management of railways by the state; (2), regulation of railways by public officers, generally a board of commissioners; and, (3), regulation by laws, prohibiting discriminations and other abuses under criminal penalties, and providing better remedies for the recovery of civil damage by the suffering parties. Of these measures the ownership and management of the railways by the states was early proposed, but has received little public support. There seems to be a general and well-founded belief that, while the management of the railways by the government might remove many of the evils of corporate control, it would certainly, in our political system, cause others as great or greater. There are still some very respectable advocates of this system, who allege that it has proved a success in Europe. But the example of European railways cannot be cited as conclusive for this country. The military considerations, which govern the leading governmental railways in Europe, are of no weight in this country, while the commercial purposes which are primary here are there secondary to the rapid concentration of troops at strategic points; nor does a comparison of their financial results with those of the American railways commend the plan. In Belgium the ratio of expenses to earnings is somewhat less on the state railways than on those of private companies; while in Germany the private railways have a slight advantage in this respect. But, making allowance for the business which the governments of these countries can put on their own roads at their own rates, the superiority of the private railways is marked, and confirms the theory, generally accepted in England and America, that



in any business, private enterprise, with free competition, furnishes more economical and efficient service to the public than the ownership and management by the state.

A conclusive argument against the operation of railways by the state is, that it would introduce into our politics a vast amount of patronage, which must largely become the spoil of professional politicians. If the present business of the government, involving the collection and distribution of about \$300,000,000 of revenue, cannot be administered with a view solely to efficiency and economy, but is used as the reward of skill in swaying the popular vote, any reformation of our politics would be made utterly hopeless, if that patronage were increased by an interest involving \$900,000,000 additional gross revenue, controlling nearly \$4,000,000,000 of property, and exercising a power over the business interests of the country beside which that of political parties is now trifling. When our politics are purified, so as to exclude from them selfish ends and improper means, it may be possible to bring the railways under political control without making them a source of general corruption. But when such a millennial stage in human progress is reached, there will be no need of railway or other reform. At present, wherever railway management is closely connected with politics, it leads to bribery, manipulation, and betrayal of the public trust. All forms of corruption would be multiplied by making that connection universal and permanent, and converting the control of the railways into the prize and sustenance of politicians and wire-workers.

Apart from the danger to public morals of a state

railway system, what guarantee is there that it would act with more impartiality and justice than the private corporations? Why should political control be more unselfish and equitable in managing transportation than financial control? If we must choose between the union of all the railways under the power of the state, and a combined corporate power such as the policy of pooling and federation seeks to establish, the former might be the least of the two evils. The administration of them would at least represent the whole people and be responsible to them, and not to the stockholders alone. But no such scheme offers any remedy for the evils of the system. Our study of the abuses of railway management is a failure, if it has not shown that they all spring from the centralization of power in the hands that control the agencies of transportation. Further to centralize and increase that power, whether under state or corporate control, would but enhance the danger. A healthy public opinion will doubtless decide that the railways can best serve society, if constructed and managed by private capital and enterprise, provided that free competition is secured, both among the railways and among their customers, and the impartiality which their public character demands is enforced. Such conditions are impossible under a centralized system of railways, whether it is under political or corporate ownership; and the general rejection of the project of state railways shows that the popular judgment has a clear understanding of its incapacity to secure the necessary reforms.

Management by the state being out of the question, the obvious suggestion is that the law shall regulate the management of railways by the corporations, so as

to prevent abuses and punish wrongs. The first crude steps towards legislative regulation took the form of fixing by law a maximum limit for rates. It was imagined that the railways, if restricted to a moderate maximum, must adjust all their rates with substantial equity, and that thus both extortion and discrimination would be held in check. Experience fully refutes this idea. Effective discriminations are always possible within the limits of any maximum rates that would allow the railway to earn its interest and dividend charges. Not only will a legal maximum of freight rates fail to prevent discriminations, but no legislative ability can frame a tariff of rates without inequality and injustice to the railways, especially in inter-state commerce. Any rate which would be just to the trunk lines of the Central States would be destructive to expensive railways reaching the mines of Colorado or California. Rates which the mines in the Rocky Mountains or Sierra Nevada can pay, and must pay, if railroads are to be built for them, would amount to confiscation if applied to the coal mines of Pennsylvania or the grain of Iowa and Nebraska. The schedule which would be just for a railway at one time would be unjust at another. The branch line through a new country must collect higher rates at first, than when it has developed the productive powers of the region. The varying conditions which may properly influence rates are innumerable. It is a hopeless task to adjust the schedules to suit all circumstances, and it is futile to expect an adequate reform of railway abuses by such means. The uselessness of attempts to establish equitable rates by law appears in the fact that every such schedule which has been in exist-

ence for ten years is now obsolete, being far above the rates now fixed by the railways. This progressive reduction of the cost of transportation has been cited as showing that all regulation of the railways is unnecessary. It is far from proving this: but it does prove that attempts to prescribe rates by law are unnecessary and futile. The laws of trade can bring about whatever cheapening of the cost of transportation competition and economy will produce. The province of legislation is to insure the free, universal, and regular operation of these laws, so that the benefit shall be equitably distributed among all interests and localities, and not monopolized by a few, while others bear the burden. When this aim is secured, and artificial interference with these laws is removed, the question whether rates are low enough or not can safely be left to them.

One remedy for railway abuses, which is too severe and radical to command general approval, has always been within the reach of legislative power, as shown twenty-nine years ago by the decision of the Supreme Court of Pennsylvania in the famous case of the *Erie and Northeast Railroad vs. Casey*.\* At that early stage in the development of railway law, it was held by this high tribunal that the legislature could declare a forfeiture of the charter of its corporate creatures, for the "abuse or misuser" of corporate privileges, and that offence was defined as follows: "Misuser or abuse of corporate privileges consists in any positive act in violation of the charter or in derogation of the public right, wilfully done or caused to be done by those appointed to manage the general concerns of the corpo-

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\* 2 Casey, 287.



ration." Apply this principle to current railway practices, as characterized by the courts during the past few years, and how many companies could escape the penalty of acts "in violation of their charters or in derogation of the public rights?" It has been again and again declared by the courts that the first obligation of the railways is thorough impartiality to all customers; that it is a condition of their charters that they shall offer equal facilities to all persons or corporations alike. It has been placed beyond dispute by the courts that the obligations of the public highway forbid combinations to exclude any person or persons from the enjoyment of their services. The declarations of the bench have been overwhelming, to the effect that all agreements to restrict competition, and to artificially control the supply of services or commodities, are against public policy and an attack upon public rights. It is not necessary to rely upon individual or popular opinion that such acts are "in derogation of the public right." The courts have distinctly declared them to be so. How many railroad corporations are there, which have not, by such acts as these, exposed themselves to forfeiture of their charters? There may be some unimportant branches that have committed no such transgressions; but there is hardly an important line in the country that is not liable to this penalty. The four great trunk lines were partners in the perpetration of the Standard Oil infamy, now known to have been a most persistent and unscrupulous violation of the public duty of impartiality. Every road that exercises an appreciable influence on the commerce of the country has, at one time or another, been a member of such pooling combinations as are charac-

terized by eminent courts as "criminal conspiracies." Nearly every road has discriminated in its rates, so as to control the route to be taken by traffic shipped beyond its lines, a practice declared by Justice Strong, of the Supreme Court of Pennsylvania to be illegal and in the nature of monopoly. Under the principles of law, laid down by the highest courts, there is no doubt that the trunk lines, the anthracite-coal roads, the Western combinations, and the Pacific railways have subjected themselves to the penalty of forfeiting their charters, if the people, through their legislatures, choose to resort to that severe and radical remedy.

No thinking man desires to see a crusade started, for the annihilation of the great railway corporations, by the destruction of their corporate existence, and the return of the public property placed in their charge to the control and disposal of the states. Such a measure would be destructive, and might fairly provoke the charge which has been too freely made against much milder proposals for legislation, that it is of the nature of confiscation. But it may be well to remember that, if the railways succeed in making milder legislation futile, or in defeating all legislation, until popular feeling is aroused to extreme and destructive measures, their transgressions have placed this radical remedy within the reach of the people. The hope and desire that other legislation will prove efficient render it unnecessary further to discuss this last resort. It is enough to say that, under the decision quoted, the corporations could be dissolved by the legislatures, and the railway tracks seized by the state, or ceded to new corporations under sufficient guarantees of the public rights. There can be no question that one or two examples of this sort

would efficiently check the aggressions of the railways. The destruction of a single great corporation, for efforts to build up monopolies, would make others extremely careful in their policy for a long time.

In planning measures for a conservative policy of railway regulation, legislators and writers are divided, as shown in the debates at the last session of Congress, between the establishment of a railway commission, and legislation of the character provided in the Reagan bill, prohibiting, under suitable penalties, the more pronounced abuses. The different measures proposed in the national and state legislatures vary widely in details; but, in their main characteristics, the two which were prominently discussed in Congress last winter are types of the respective classes. The same division of opinion found expression in the debate during the last session of the Legislature of Pennsylvania, and, indeed, wherever the subject has been brought up for legislative action during the last two years. The more active and radical advocates of railway reform generally favor, in substance, the plan of what is known as the Reagan bill. Legislators of more moderate views commonly adopt the distinctive idea of the Cullom bill, the establishment of a Board of Railway Commissioners, and are often supported by the representatives of the railways, who prefer this as an alternative to more radical measures. The two propositions have much in common. Both attempt to define and prohibit discriminations and unreasonable rates, declare such offences misdemeanors, and provide civil remedies and criminal penalties for them.\* They differ in that the Cullom bill

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\* The Cullom bill has but two sections prohibiting railway abuses. The first defines the demanding or receiving of "more than a reasonable

forbids rebates and drawbacks only where they inflict unjust discriminations, while the Reagan bill prohibits these practices altogether; that the Reagan bill forbids pooling, while the Cullom bill refers the subject to the commission; and that the Reagan bill forbids the charging of a greater rate for a shorter than for a longer haul which includes the shorter. The most

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rate of compensation" for any of the services of a transportation company as "extortion," and makes it a misdemeanor. The next section provides that for a railway to "demand, collect, or receive from any person a greater compensation for any service it may render in its transaction of inter-state commerce," than it charges to another person for "similar and contemporaneous service, under substantially the same circumstances and conditions," shall be a misdemeanor; and that whether it is effected "directly or indirectly, by rebate, drawback, or other device," the fine for each offence shall be \$1000.

The Reagan bill, in its prohibitory sections, declares it to be unlawful "for any person or persons engaged in the transportation of property by railroad or by pipe line or lines," from one state or territory to another, or to foreign countries, to "directly or indirectly charge to or receive from any one person or persons any greater or less amount of freight, compensation, or reward than is by him or them charged to or received from any other person or persons, for like and contemporaneous service in the carrying, receiving, or hauling of the same." Another addition to this section, wholly foreign to the purpose of the bill, fixes the maximum rate of fare on passenger travel at 3 cents per mile. The next section prohibits the granting of "any rebate, drawback, or other advantage in any form," directly or indirectly. The third section makes it unlawful, on the part of the railways, to enter into combinations to prevent the carriage of property "from being continuous from the place of shipment to the place of destination; or to enter into any contract, agreement, or combination for the pooling of freights, or to pool the freight of different and competing railroads, or to divide between them the aggregate or net proceeds of the earnings of such railroads." The fourth section makes it unlawful for the railways to charge a greater rate for performing a given service for a shorter than for a longer distance which includes the shorter, and applies to all the roads in use by a corporation whether owned or leased by it. These prohibitions are reinforced by the fifth section, requiring the posting of rates in all depots where freight is received, at least five days before any change goes into effect. The violation of any of these sections subjects the offender to a fine not exceeding \$2000.



important difference, however, is in the legal remedies which they provide against offences prohibited. The Cullom bill establishes a board of nine railway commissioners, who are authorized to hear and investigate complaints in all parts of the United States; to assess damages if unlawful acts are proved; and if any railway fails to pay such damages and to discontinue the offence, to certify the case to the district courts of the United States, which may enforce the collection of the damages and, by mandamus, compel the railway to obey the law. The Reagan bill leaves its provisions to be enforced by the existing courts, only seeking to make the remedy more direct and easy. For this purpose it permits the injured party to bring suit in any state or federal court, within whose jurisdiction the offending railway has an office; it awards him exemplary damages, three times the loss which he can prove that the discriminations have inflicted upon him; it makes the resort to a mandamus from the Circuit Court of the United States cumulative, and where perishable freights are involved, it authorizes that the writ of alternative mandamus shall be returnable forthwith. These are the main points of difference, briefly stated, between the two proposed forms of regulation: one would establish a commission, armed with certain governmental powers, and supposed to represent the people; while the other simply seeks to render easier and more effective the resort of aggrieved shippers to existing courts.

The plan of a governmental tribunal, which shall give exclusive attention to the abuses of railway management, has much that is attractive. It aims to bring the strength of the government to aid the weakness of

aggrieved individuals, in their suits against powerful corporations. It recognizes the fact that the failure of common-law remedies to prevent discriminations is due to the insuperable difficulties which confront private citizens in litigation against the railways. It proposes, therefore, to establish a body armed with the power of the state, in behalf of oppressed shippers, such as can meet on equal terms the strength of the corporations. The idea of a tribune of the people, established to defend private rights against corporate aggressions, and strong enough, as representing the whole people, to restrain the undue and threatening powers of the railways, is very enticing in the abstract. If it could be made certain that this conception would be realized in fact, that commissions so established would faithfully and energetically represent and protect the people, that the powers which it is proposed to vest in such bodies would be sufficient to enforce the law, and that the nine commissioners would not themselves hold an undue and dangerous control of commerce, the method of regulation by a commission would present advantages over any other plan yet formulated. But while the plan is, in theory, very attractive, its practical operation involves such wide possibilities, with such a range of possible results, from absolute uselessness to excessive and undue restriction, that it may be doubted whether its ideal purpose could be realized.

The powers conferred on commissions, by the measures enacted or proposed in various legislatures, differ very widely. Such a body may have entire control of the railways or may have no powers at all; it may have definite and stringent legislation against railway abuses, which it is authorized to enforce, or it may have no di-

rect statute under which to act in restraint of such evils. It may be empowered to fix rates for the railways, as in Georgia, or it may be authorized only to hear and investigate complaints and make recommendations to the legislature, as in New York. A commission might be erected to enforce the provisions of the Reagan bill, or it might be so constituted that drawing its salary, and holding stated sessions to discuss railway interests, would be the limit of its usefulness, as is substantially the case with the Massachusetts Railroad Commission at the present time. In the wide range of measures proposing commissions, the Cullom bill is a fair example of those which sincerely aim to restrain by law the abuses of discrimination and exorbitant charges. It does not invest the commission with such extraordinary powers as some state laws in existence, nor does it, like others, stop short of giving it any powers at all. Having been made prominent by its passage through the Senate, it must be accepted as fairly representative of the method and aim of a large class of similar measures. If fairly construed and enforced, this bill seems likely to suppress the most serious railway abuses. But its effectiveness depends so entirely upon its construction, that what the bill would accomplish cannot be foreseen. Its language may be understood as prohibiting almost everything now practised by the railways. Although the eleventh section distinctly refers the subject of pooling to the commission for subsequent report, it was declared by one of the supporters of the bill, on the floor of the Senate, that the second and third sections clearly prohibit pooling.\* A much less forced construction will find in the same sections prohibitions

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\* Senator Pugh, of Alabama, *Congressional Record*, vol. vi. p. 1260.

of discriminations between localities. If the railways are anxious to carry cotton from Memphis to New Orleans at \$1 per bale, does not that make the charge of \$3.25 per bale from Winona, about one third as far, obviously "unreasonable?" It is plainly a discrimination to transport two car-loads of freight a given distance for one man, at the price charged on one car-load for another, for it is practically transporting each car-load for the first at less than for the second. Is it any less plainly a discrimination, when the railway hauls freight for one shipper a given distance, for the rate it charges another for half the distance? That part of the haul which is common to both shipments is evidently made much cheaper to the freight that comes farthest. But if the railways interpret the provisions of the bill, it would make no change in their methods. Rates are always reasonable to them. Mr. Fink is on record as declaring that such a freak as the Winona and Memphis freight tariffs might be reasonable, because there was competition at Memphis and none at Winona. There never was a discrimination, that was not justified, in the view of the railways, by some difference in the conditions. A radical construction of the Senate bill, vigorously enforced, might make it the most restrictive legislation ever proposed on the subject. Construed according to the railway views, or enforced weakly and negligently, it would be a dead letter. The practical decision, therefore, whether such a law should be a dead letter or a living power, would rest with the commission it creates, which could, at will, apply its provisions vigorously, or make them of no effect.

On this point the plan of regulation by commissions must turn. It stakes the protection of commercial in-



terests upon the sincerity, energy, and intelligence of a board of commissioners, appointed by political influences, and subject to the same temptations and inducements to neglect their duty as the executive departments of the government. But, by the very nature of the commission, the pressure of these inducements and temptations will be multiplied. No matter how stringent or specific the law may be, in prohibiting extortionate rates, discrimination, or pooling, its effectiveness, if its enforcement is put into the hands of a commission, will depend entirely upon the vigor and faithfulness of that body. What guarantee have we, in the provisions of the bill or in the influences that would control the selection of commissioners, that they would display these qualities? It must be remembered that this legislation seeks to restrain the greatest power in the country, except the united and aroused popular will. It confronts not a local or private wrong-doer, but the organized and combined power of the railway corporations, with unlimited political influence, infinite resources for corruption, and secret methods for controlling appointments and legislation. This power has kept courts in its pay, it defies the principles of common law, and nullifies the constitutional provisions of a dozen states; it has many representatives in Congress, and unnumbered seats in the State Legislatures. No ordinary body of men can permanently resist it. Here is the fatal weakness of laws establishing railway commissions, whether their other provisions be radical or mild. If, by any happy suspension of the nature of things, the stream turned out to be purer than its source, what hope is there that it could be kept clear and undefiled, under the corrupting influences which

would await it at every turn of its future course? It is possible that, in obedience to an imperative public demand, such a body might be organized with the sincere purpose of restraining and preventing corporate abuses. The popular will has established such bodies in one or two states. But legislation must regard the future, and seek a remedy that will be effective, not merely for the next year or two, but for future generations. Let popular vigilance be lulled, or the public attention directed to other issues, and will not this stealthy and almost resistless power gradually fill the commission with its tools, or win over the members to its purposes? It is idle to hope that a board of nine commissioners, with salaries such as a great railway pays its third-class subordinates, will permanently remain superior to the manifold forms of pressure and corruption that can be exerted by four thousand millions of railway capital, until it has been demonstrated that a house-maid's mop can keep back the tides of the Atlantic Ocean.

Pessimistic as this view of the susceptibility of official nature to the influences of corporate power may appear, it is abundantly borne out by glaring instances, in a much higher range of official life than would be awarded to the members of a railway commission. When a department of the national government is believed, by the secret use of its authority, to have served the interests of land-grant corporations, it is not unreasonable to apprehend that corporate influences might corrupt a body of much lower standing. When the Supreme Court of Pennsylvania, so long eminent for ability and integrity, has become a proverb for its services to the Pennsylvania Railroad, it seems hopeless to ex-

pect a body of much humbler position to withstand a far greater and more direct pressure. The dignity and honor of the national cabinet, or of a supreme court, afford far stronger intrenchments for integrity and public duty than the position of railway commissioner, while the duties of the latter bring against them, with a hundredfold greater energy, the forces combined to assail them. Such a body would sooner or later become a mere bulwark or outpost for the defence of corporate abuses, instead of a fortress of popular rights. To expect this is simply to recognize the limitations of human strength, when pitted against the vastest power for corruption ever known. The result of the unequal match is as certain as if nine men, however expert and strong, were ordered to stand in the path and arrest the destructive course of a mountain avalanche.

The force of this objection to the regulation of the railways by a few commissioners is shown in the history of such bodies, when established by state legislation. Railway commissions are in existence in Massachusetts, New York, Georgia, Illinois, Iowa, Kansas, Colorado, and California.\* Some of these are invested with large powers, while some are merely supervising and advisory boards. Only two of these bodies have, within four years, made any active effort to restrain abuses which have aroused the press and the public to impatience. The other six, for any practical benefit they have secured to the people, might as well have charge of regulating the movements of the heavenly bodies. It is instructive to notice that the effectiveness

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\* In nearly a dozen other states, the office of railroad commissioner is established by law, for the theoretical purpose of collecting statistical reports, but it is practically, in almost every case, a sinecure.

of these boards appears to have no relation to the thoroughness or radicalism of the legislation by which they are established. The Georgia railway commission has perhaps as great powers as were ever proposed for any such body; and its energy in enforcing them has attracted the enmity of the railways, which have recently demanded the restriction of the powers of the commission. The California commission, with powers almost if not quite as great, has not vitality enough to make even a passing impression on the sway of the Central Pacific over California commerce. The Illinois commissioners, holding about the same powers proposed by the Cullom bill, with the additional prerogative of prescribing maximum rates, has of late years shown a disposition to investigate and correct the most serious of the abuses which it is its duty to check. The commissions of other states exhibit varying evidences of inefficiency, from futile attempts to restrain corporate power, to supererogatory efforts to strengthen the railways in their supremacy over commerce. It is a significant measure of the adequacy of this device, that even in Illinois, where the commission was established in obedience to the same overwhelming public demand for regulation of the railways which produced the famous Granger legislation, it served for several years only to show how useless and lifeless such a guardianship of the public interests can be. And even now the charge is made in that state, through the press, that "the railroads, in violation of the law, are making unjust discriminations whenever it suits the convenience and interests of some pool, and that the commissioners are doing nothing to protect the people's interests." Certainly the plan of regulation by commissions has



not shown itself to be an adequate or permanent policy.

The commission that has been in operation for many years in Massachusetts, and that more recently established in New York, deserve attention, as embodying the idea that such a board, with the mere power of supervision and advice, can restrain railway abuses through "the moral influence of public opinion." This view was made especially prominent in the debates of Congress by representatives from Massachusetts, who lauded the commission of that state as the panacea for all railway ills. Hardly any idea is more hard-worked, in proportion to its strength, than this of the moral influence of bodies which have no power to enforce their opinions. It was asserted in Congress, as an evidence of the influence of such commissions, that the Massachusetts commission had, by its recommendations, secured the building of a new depot in Boston, and that the New York commission had brought about reforms which cost the railways \$200,000. I can imagine that when public attention is aroused, the railways may concede minor points on the recommendation of the commission for the purpose of allaying agitation. But that the moral influence, either of the commissioners or of public opinion, would have weight against the vast prizes to be secured for railway managers and their friends by really vital aggressions, is a figment of the imagination. The moral influence and protests of the press and the public, against crushing an independent and prosperous industry, did not weigh a scruple, when a petroleum monopoly worth \$100,000,000 was in the other side of the scale. The moral influence of the press and the public, of magazine writers and public officials,

even of such standing as the Governor of Pennsylvania, has never had the slightest effect on the anthracite-coal combination. Moral influence may be worth a few thousand dollars to a railway company, but when weighed against the millions at stake in any important railway abuse, it seems a trifle.

It is not difficult to see how, in a state whose stockholders largely outnumber, among the influential classes, the traders who suffer from unequal rates, a commission, which gives its principal attention to the evils of stock watering and market manipulation, should be as satisfactory to the public as to respectable railway managers. But the Massachusetts commission affords little promise of dealing effectively with such great evils as have been most conspicuous in railways outside of its respectable but somewhat contracted jurisdiction. Evidence that such a body could grapple successfully with an abuse like that which built up the Standard Oil Company, or break down the tyranny of a combination like the anthracite-coal pool, or check the aggressions of an unscrupulous power like the Southern and Central Pacific plutocracy, will be sought in vain among its records and reports. On the contrary, a signal and mournful instance of the inability of the most eminent men who can be placed on a railway commission to resist the pressure of corporate influences, and to maintain independence as defenders of public rights, is furnished by its founder. There was no man in the country more conspicuously pledged to the support of public interests against corporations than Charles Francis Adams; there was no man whose social position and personal character seemed to be better fortified against influences which might induce

ordinary men to surrender their independence. I do not believe that he has consciously surrendered any of his convictions on these questions in exchange for place or fortune; nor do I think his present position, as president of the Union Pacific Railway, inconsistent with a genuine indignation at the gigantic frauds which he exposed in its former management. But one of the most powerful influences in forming a man's conviction is the consciousness where his interest lies. The irresistible force of private interest, in shaping the views of eminent men on public questions, is the most prominent lesson in the career of Charles Francis Adams. The English language contains no more vigorous or telling exposure of the dangers from great corporations, of their attempts to control legislation and courts, and of the necessity for protecting the people against their encroachments in all forms, than the earlier writings of this able gentleman. Yet the very prominence given to him by these writings marked him as one on whom corporate influences must be brought to bear; and by successive steps he passed from one position in the railway hierarchy to another, until he is now one of the two leading advocates of the policy of bringing the nation under the sway of a vast corporate federation. This result shows the hopelessness of staking public rights upon the issue between the independence and integrity of a few individuals, and the practically infinite resources for corruption held by the railway managers.

The commission that has been in existence for a couple of years in New York occupies a different position from that of Massachusetts. It is brought directly into the conflict between the greatest of the railway

powers and the largest business interests. Representing a large stockholding public and a still larger trading public, it would naturally seek to secure protection for shippers without impairing the earnings of the railways. But if there were any hope in railway commissions for the protection of public rights, such a body, founded after the most searching legislative investigation ever made into railway abuses, could not shut its eyes to those abuses, and sustain, in its recommendations, the offensive theory of railway ownership in the traffic of the section through which it passes. Yet this seems to be, in substance, what the New York commission has done. Two of its three members seem to have adopted the views of the railways, while one member has faithfully represented the public interest. The proportion has not been favorable to the effectiveness of the board. It has secured the reduction of the rates on milk to New York city, and it has unsuccessfully advised the railways to discontinue the diversion of freights. The net value of the influence of an advisory commission is shown by the fact that sundry other recommendations to the railways have been disregarded, until the commission itself asked the legislature for power to enforce their advice by applying to the courts for a *mandamus*. The anthracite-coal pool, the trunk-line pool, the Standard monopoly, and the practice of diverting freights, are carried on within the jurisdiction of this body, but it recommends no legislation on these topics. The Court of Appeals of New York has declared an association far less important and dangerous than the least of these combinations to be unlawful, as "nothing less than an attainment of an exception of the standard of freights



and of the facilities and accommodations to be rendered to the public from the wholesome influence of rivalry and competition." With this decision before them, the sole deliverance which these tribunes of the people could make, on the subject of pooling, was the tentative remark of one of them, that they were "not satisfied of the legality of pools;" while their nearest approach to recommending legislation on the subject is the preparation of a bill to sustain the combinations against competition by restraining the construction of new roads!

This proposition is based on the view that new railway construction "is frequently at the expense of vested rights and grave public interests."\* This is the first official enunciation of the doctrine that the railways have a proprietary right in the traffic of the localities which they serve. The extreme claim of railway proprietorship is that it owns the shipping business of the men who depend on its services, and that all efforts to compete with it are "robbery." But it is startling to find a body, founded to protect the public against the railway power, asserting that ownership as a "vested right" and a "grave public interest." No legal franchise or actual property interest of the railways can be impaired by competition. This idea, that the railways have a vested right in the absolute control of their traffic, is repeated in the next sentence, which affirms the "obligation" of the state "to protect existing railroads from useless and disastrous competition by unnecessary new ones." Such extraordinary tenderness for the power of the railways over their shippers, and such readiness to assert that the monop-

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\* Report of New York Commission to the legislature, December, 1884.

oly of the railways at points where they have no competition is a vested right, contrasts strangely with the failure of the commission to find any subject for proposed legislation in the notorious evils of pooling and combinations to control great interests of trade. But the commission's action and its inaction explain one another. Men who could propose to restrict the public right to build new railways wherever capital desires to find an investment, could, of course, see nothing wrong in combinations to prevent competition between railways already existing. Such a body would naturally adopt the notion that competition is the great evil, which must be prevented at whatever cost to public or individual rights. The people, whom this body is supposed to represent against the railways, may be thankful that its guardians did not make their work complete, by presenting a bill forfeiting the charter of any railway that dares to keep up competition against the mandates of the pool.

An exhaustive examination of the nature and acts of the railway commissions in the several states is beyond the limits of this work. We here simply inquire, how far the workings of these bodies encourage the hope that the general adoption of the plan, in national and state legislation, would afford adequate and permanent protection to the public. Upon this question the facts stated seem to be decisive. A plan which, among the state commissions already constituted, results in, at most, two out of eight that are efficient and useful, does not promise to grapple successfully with the vast railway powers of the entire country, in the interests of independent commerce. The power which has converted the Charles Francis Adams of 1875 into

the Charles Francis Adams of 1885, cannot be conquered and held in subjection by any body of nine men at salaries of \$7500 each. Such legislation as results, in the greatest state of the Union, in a commission which, constituted for the public protection, assumes the guardianship of the railways, and proposes to limit competition by forbidding capital and the public to build new roads, will never adequately protect the public interests. To put such a body of weak and fallible men in charge of the vast interests of commerce, against the aggression of the immense power of combined railway capital, is not less fatuous than it would be to station a pigmy sentinel at the doors of the treasure-house, and bid him guard it against an army.

The estimate which the railway corporations form of the probable value of commissions, in restraining their cherished abuses, appears from the fact that wherever regulative legislation has become inevitable, the railway advocates have, of late years, urged the establishment of them. Their preference for this form of legislation rests on an accurate estimate of the respective powers of official independence and corporate influence. There is nothing in the character of a commission to insure moderation or conservatism. Left to itself it may be either a scourge or a cipher. What guarantee have the railways, that the commission constituted to supervise them may not practise the most vexatious and harmful interference with their operations? \* What security have the public that such a

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\* As an illustration of what a commission might do, take the complaints which have been made within the past year concerning the operations of the Georgia board. It was represented, in an appeal to the legislature, by the railroads centring in that state, that the reductions

body might not attempt unjust measures, exercise their power arbitrarily, or, in fixing rates, compel the railways to carry some classes of freight at a loss, or at the expense of other business? To set up a board of nine men, with the power to govern these vast interests, is to subject the public welfare to the mere chance of their being wise, moderate, and disinterested beyond the common lot. Assuming that such a body will have energy and independence enough to control the situation, the vast power it can exert for evil is as serious a difficulty as its liability to sink into obscure uselessness. The preference of the railways for the commission plan, where they must submit to some legislation, proves that they have little fear lest any commission be too active or powerful for them to control; and we have seen that their estimate of their ability to control it is not exaggerated. The commission might interfere arbitrarily and injuriously with all departments of railway traffic; it is more likely to neglect its duties to the public and to confine itself to enjoying the emoluments and perquisites offered by its position. To subject the vast interests of commerce and transportation to a body which may become either the tyrant of the corporations or their tool, is not the way either to secure true prosperity to the railways, or to protect the freedom of commerce and the rights of the public.

Opposed to the Cullom or Senate bill in Congress

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in rates made by the commissioners were "simply crippling the railroads." The fact that this appeal resulted in a bill restricting the power of the commission over rates, is not conclusive as to the accuracy of the statement; but the railway presentation of the case certainly excludes the view that the commission plan is necessarily the most conservative form of legislation.



last winter was the Reagan bill; and measures embodying the respective principles of these bills came before some of the state legislatures. The Reagan bill has been advocated by the Congressman whose name it bears through many sessions, and made its nearest approach to success in its passage by the House last winter. The title of Mr. Reagan to the authorship of the bill was disputed in the debates, Mr. Rice of Massachusetts attributing it to Mr. J. H. Hopkins, the member from the Pittsburgh district. Whether Mr. Reagan, Mr. Hopkins, Judge Black, or some unnamed author wrote the bill, it clearly expresses a matured policy for correcting the wrongs of railway management. It proposes to make the legal prohibitions specific and direct, and to facilitate the recourse of private shippers, who may be wronged by the roads, to the courts of law. Rejecting the plan of a commission for the defence of popular rights, it proposes simply to make the definition of these rights as clear as possible, and to leave the protection of them, where it now rests, with the courts. It makes no essential change in the relation of the shipper to the railway, as already settled by the courts under the common law. The aim of the bill is to make the resort to the courts easier and more effective. Whether Mr. Reagan devised this form of legislation, or adopted the work of others, the unswerving steadiness and ability with which he has urged it, throughout four terms of Congress, entitle him to give his name to the measure. It was customary in the debates of Congress and in the public press, while these measures were pending, to represent the railway-commission plan as conservative and careful, and the Reagan bill as radical and vexatious. It is

hard to find any foundation for such an opinion in the provisions of the latter. It prohibits all forms of discrimination and requires reasonable rates, in language rather more painstaking than the Cullom bill; but the exact application of those prohibitions, in both, depend largely upon their construction, and the practical difference in this respect is unimportant. Their points of substantial difference are as follows.

1. The Reagan bill prohibits rebates and drawbacks altogether, while the Cullom bill only prohibits giving any advantage by such devices. The latter seems on its face to be equitable; but as the sole purpose of rebates and drawbacks is to afford a cover for advantages to certain shippers, the provision of the Cullom bill is much like making it illegal to break into a house for the purpose of stealing, but permitting house-breaking whenever no purpose of robbery is proved.

2. The Reagan bill prohibits pooling, which the Cullom bill, unless an extreme construction is put upon its language, leaves to the reports of the future commission, and the action of future legislators. Although this prohibition was made a ground of attack on the former measure, it is but a statutory declaration of a principle already shown to be settled at common law.

3. The Reagan bill prohibits a higher charge for a short haul than for a long one, which includes the former.

Here was a point of conflict in the Congressional discussion of the subject. The railway advocates cried out in alarm that, if it were enacted, the railways must cease transporting through freights; not observing that such a law would only force them to sustain rates on that class of traffic, as the railway pool has long been trying to do in vain. The fear of some of the Western

men was that this section might compel their constituents to pay higher rates for transporting grain to the seaboard. Yet under its provisions a railway could carry grain a thousand miles as cheaply as a hundred, if it chooses; but it must not charge more for the hundred miles than for the thousand. The declaration of the railway advocates, that such a provision is impracticable, sounds strangely in connection with their praises of the Massachusetts law, when it is found that the Massachusetts law contains exactly this provision.\*

The affection of the railway interest for the Massachusetts style of regulation indicates that this provision cannot be such a terrible one after all. The subject of rates for long and short hauls has been fully discussed elsewhere. It is clear that the cost of service in freight transportation comprises two elements; one of which, consisting of terminal charges, is the same on similar classes of freight, whether it is carried a hundred or a thousand miles; the other, consisting of motive power, wear, and tear, and interest upon capital, varies in exact proportion to the distance.† It is impossible, therefore, that the cost of service can be more for a less than for a greater distance which includes the less; and charges which bear an equitable proportion to the cost of service must be somewhat greater for the longer haul, to cover the difference in

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\* "No railroad corporation shall charge or receive for the transportation of freight to any station on its road a greater sum than is at the time charged or received for the transportation of the like class and quality of freight from the same original point of departure to a station at a greater distance on its road in the same direction."—*Massachusetts Revised Statutes*, section 190.

† This was clearly demonstrated by Senator Mahone, who may be said to have been almost the only railroad president in Congress who talked sense on this subject.

the second element of cost. The Reagan bill does not go so far. As Mr. Reagan himself said in Congress, it still permits discrimination against shorter hauls, and only seeks to do away with the absurdity of such a proclamation to shippers as this: "If you send a car-load of grain from Chicago to Buffalo we will charge you \$50; but if you will send it through to New York we will not only give you the extra haul for nothing, but we will throw off \$20 from the charge." The railway is still permitted to bring St. Louis as near to New York as Pittsburgh is, if it desires; but it cannot bring it any nearer. No honest advocacy of the railways can ask more scope for their freedom of action than this.\*

The section requiring publicity of rates was severely attacked in the House of Representatives last winter. But such publicity is essential, and the rates published must be maintained. If the law undertakes to enforce the "reasonable, uniform, and stipulated rates," declared by the Supreme Court of the United States, in 1842, to be the right of all upon the public highways, it must assure to the public full information of what these rates are. Secrecy of rates can be useful only in covering discriminations, special privileges, or surreptitious reductions.

The most plausible objection to this provision refers to the clause requiring the schedule of rates

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\* The character of the opposition to this provision is exposed by the fact that, while the representatives of the Pennsylvania Railroad, last winter, both on the floor of Congress and in the Pennsylvania Legislature, declared it impracticable, ruinous, and restrictive, the same prohibition is to be found in a law of the State of Pennsylvania, passed in 1861, for the benefit of that corporation and at its instance, conferring upon it material advantages.



to be posted five days before it goes into effect. Against this the advocates of the railways in Congress protested that it would "destroy competition." Admitting that it would do so, the retort is pertinent that the railways, now struggling to prevent competition, ought to welcome the assistance of the law in their great effort. But it would not destroy competition; although, under existing conditions, it might work hardship to the railways, at points at which they compete with transportation agencies not under the control of the act.\* There is some force in the objection that this section does not sufficiently provide for such special cases. In competition between a railway and a water route, for example, the latter could reduce charges and take all the business, for five days before the reduction in railway charges could take effect; and at the end of that time, by another cut, might again take all the business, for five days more. The same course might be taken by a railway not subject to regulation by the national laws. Provision should be made against this danger. If the critics of the section had been as anxious to perfect the measure as they were to strengthen opposition to it, they could easily have devised an amendment, permitting the railways, on freight subject to competition by routes not controlled by the act, to make reductions which shall go

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\* There is a rather startling contrast between the strenuous opposition to this provision of the Reagan bill, and the subsequent proposition of Mr. J. H. Devereux, on behalf of the railways, before the Cullom Committee, to require the publication of rates under severer penalties, and to make the period of notice six times as long. Thus we learn that measures which are unjust and impracticable, if proposed in a moderate form for the public interest, are practicable and wise when pushed to an extreme for the support of railway combinations.

into immediate effect when posted. Such a proviso would preserve the principle of publication, and would enable the railways to meet outside competition. The first duty of legislation is to guard public rights. It is less important, but still eminently proper, to protect the railways in the legitimate conduct of their own business. In this matter, at least, the two objects are entirely compatible.

The recourse given by this bill to the courts is the point in which it is most evidently superior in conservatism to the Cullom bill. Instead of introducing into the decision of such questions a supernumerary body, whose character and influence must remain unknown until fully tested, it refers its provisions for enforcement to tribunals from which the highest independence and impartiality may be expected. The courts may not always be superior to corporate influence; but with liberty of selection, the complainant will have an opportunity to make his case fairly heard. The shipper will be likely to prefer this remedy to that of the Cullom bill. Under the one system he is the defender of his own rights, retains control of his own case, selects his own counsel, and can exert his energy to press his claims. Under the other he must support his claim through two courts, the first of which can decide finally against him, but not against the railway. If his case is not stifled in the commission, nor by the district attorney into whose charge it passes, it then reaches the same stage in the United States courts at which it is allowed to start by the Reagan bill. The railways should prefer the direct appeal to the courts; for, unless they expect to corrupt and control the commission, this will be simply an additional tribunal before

which they must defend themselves, with the possibility that it may be an arbitrary and injurious body. As far as any adequate regulation of railway matters can be provided by litigation, the provisions of the Reagan bill afford better promise than those of the Cullom bill, for a moderate, conservative, and yet independent and effective decision of disputes.

The penalties of the House bill go further than those of the Senate bill, in awarding damages for discriminations to three times the amount proved to have been suffered, and in imposing a fine of \$2000 for violations of the act instead of \$1000. The first provision looks rather harsh at first sight; but a study of the subject shows that exemplary damages are necessary, to make the prohibition of favoritism effective. If there were any satisfactory means of computing consequential damages in such cases, it would be better to leave the award wholly to the jury. But no such means can be devised, and the award of triple damages is moderate, when compared with the practical effect of the customary discriminations. As to the question whether the fine, for wilful violations of the law by railway officials, shall be \$1000 or \$2000, either sum is so trifling in proportion to the immense pecuniary advantages which a railway official can gain by such violations, that it does not make much difference which penalty is prescribed.

The Reagan bill has been denounced, as establishing an iron-bound rule over railways, as interfering with their freedom, and as severe and arbitrary. In its general features, however, which have been copied in similar legislation proposed in the states, it is really among the most moderate and least likely to produce

unwarranted interference, of all prominent measures proposed for the regulation of railway traffic. It attempts no interference with the legitimate operations of the railways. No inflexible rule is laid down to control their transactions. It simply prohibits certain common practices under suitable penalties. Its prohibitions may be classed, in general terms, under five heads:

1. The railways must not discriminate between individuals, and their rates must be reasonable.

2. They must not discriminate between localities, to the extent of charging more for a shorter distance than they do for a longer one which includes the shorter.

3. The use of rebates and drawbacks, as a cover for discriminations, is absolutely prohibited.

4. They must not pool or combine with other roads.

5. They must give full publicity to their rates.

The bill is only an authoritative expression, in statutory form, of what has already been declared, either directly or inferentially, by the best authorities, as common law. Discriminations, excessive rates, and pooling combinations have been declared illegal by a line of decisions from Chancellor Walworth to Judge Hallet. The Reagan bill goes beyond the common law, only in forbidding rebates and in requiring public rates, which are essential means of enforcing the main prohibitions, and in its long-and-short-haul provision. It differs essentially in its prohibitions from the Culom bill, in forbidding pooling, and in the long-and-short-haul provision. No one, who accepts the principle that rates must be reasonable, can consistently object to a provision that the railways shall not commit the offence against reason of charging more for a less ser-



vice than for a greater. Of all legislation which aims merely to regulate existing methods of railway business, this is the most reasonable and conservative measure yet matured, and affords the best promise of some effective remedy for prevailing evils.

But, admitting all this, the chance that it will be adequately and permanently effective is very slight. The same causes which make the common-law remedies inefficient in preventing or punishing these practices, will continue to operate under the Reagan bill. In addition to the expense, delay, and difficulties of the litigation, the great fact, that will place the relief contemplated beyond the reach of the mass of sufferers, is that whoever seeks it must incur the enmity of a power whose good-will is essential to his prosperity. If he becomes aware of one species of favoritism from which he is suffering, he may apply to the courts, and, after long and vexatious delays, may win his case; but in the meantime some other form of discrimination may begin against him, only to be rectified by another indefinite season of litigation, and so on without limit. It has been asserted that a railway can ruin a large shipper, merely by delay and interference in the transmission of his goods, on which no definite charge of unfairness can be made. Whether this is true or not, it is certain that the man who attempts by litigation to meet all the devices through which an inimical corporation can obstruct his business, and to force it to treat him with absolute fairness, enters upon a course which will exhaust an ordinary purse, and drive any but the most imperturbable to lunacy. It was defiantly said, in the Congressional debate, that if the bill were made law, the railways would ostentatiously ignore its

provisions. It is not likely that they would do so, with such ostentation as to afford proof that would convict them in the courts. Their managers are too intelligent to furnish such a weapon against themselves; but it may be confidently assumed that these, or any other provisions against abuses which can be enforced only by litigation, would be habitually violated with impunity, because the great mass of business men dare not enter upon a legal fight with corporations controlling their means of communication with their customers. To set a private individual against the railways in such a contest as this, is like pitting the bows and arrows of the ancient archers who fought in the Greek galleys at Salamis against the Krupp guns and steel-clad vessels of the present day.

In short, the Reagan bill brings a little help to the defence of commercial rights by the common law. It specifies the act prohibited. It brings the remedies somewhat more easily within the reach of the injured party; and makes the damages and penalties slightly heavier. All this is only strengthening a rampart which has been shown by experience to be wholly insufficient to check the advance of the enemy. When all the kindred restrictions of the law upon discriminations and combinations for pooling have been nullified for years—the railways ignoring the law, obstructing suits in the courts, and smothering the assertion of individual rights—there is not much reason for believing that a slight strengthening of these provisions will adequately protect public rights. It might temporarily check certain abuses; but when the corporations should discover the little difference between the new law and the old one, the process of subjugating commerce would

be resumed. Something more is needed than the patching up of the old methods of enforcing the common law, over which the corporate power has ridden without check from its inception to the present time. If an invading army has marched over the earth-works of a defensive position with hardly a pause, is it less than fatuity to raise the next parapet by a few more shovel-fuls of earth, and to invite the enemy to a fresh attack? Not thus is the liberty of a nation defended against conquest. How can a weak and paltering policy avail more in the defence of commercial independence against corporate invasion?

Another weakness of the Reagan bill is that, while its provision concerning long and short hauls is a sincere attempt to solve that difficult question, it fails to prohibit any but the most glaring inequalities between localities. As Mr. Reagan himself confessed, and as a Senatorial opponent of the measure urged with some success, it still leaves room for vital discriminations in favor of the longer haul. The cause of these discriminations is the uneven pressure of competition, which the Reagan bill does not attempt to correct. They are practised in forms which, if less startling than some of those which have been cited, are yet decisive in determining the fate of many business firms, wherever the short haul is between competitive points and the long haul is not. The discriminations already noted, which oppressed the iron trade of Pittsburgh, from 1875 to 1879, were mainly of this character. The farmer near Abilene, Kansas, whose grain has to bear a freight charge of 15 cents per bushel for transportation 1350 miles to the seaboard, finds in the Reagan bill no alleviation of the advantage given to the farmer

near Kansas city, who gets his grain carried 1200 miles for 5 cents a bushel. This is not the fault of the author of the measure. It is impossible for any mere prohibitory clause to secure exact justice in rates to and from all the numberless localities. Although the charge was made against the Reagan bill, that this section requires rates to be strictly in proportion to distance, every leading advocate of railway reform recognized the folly and uselessness of such requirement. The provision as to long and short hauls in the Reagan bill is the best that can be done by that kind of regulation; but its failure to afford any remedy for a vast multitude of discriminations shows the weakness of the scheme. These inequalities must be left unchecked, until legislation finds a way to give free play to the laws of trade, which will determine rates with unerring justice.

Perhaps the most thorough regulative measure yet formulated is that which was proposed by the Hepburn committee of the legislature of New York, comprising the leading features of both the classes of bills just discussed. It was the result of a searching investigation which occupied nearly eight months. The committee took some five thousand pages of testimony, made a report, which was recognized as one of the ablest presentations of this question yet given to the public, and accompanied it by bills which were embodied in the New York anti-discrimination bill of 1880. The essential provisions of this bill were: First, requiring publicity of rates; second, prohibiting preferential rates; third, prohibiting drawbacks and rebates; fourth, enacting that no more should be charged for a shorter haul than for a longer one over the same line; fifth,



declaring pools illegal; and, sixth, establishing a board of commissioners to see that these provisions are enforced, to investigate complaints, and to secure justice between shippers and carriers. Such a measure would have more chance of practical success than any of the measures heretofore discussed. It goes as far as the Reagan bill, in enumerating and defining the prohibited abuses, and brings to the aid of the shipper the commission, whose theoretical duty it would be to hear his complaint and espouse his cause, if well-founded. The public sentiment which would secure the passage of such a measure would doubtless insure the appointment, as commissioners, of active and earnest champions of public interests. But whether such a good beginning would be followed by permanent efficiency in this mode of regulation, or whether the influence of the corporations would gradually gain control of the board, is a question on which we have seen reason for doubt. The measure was defeated in the legislature of New York by the influence of the railways. An act creating a commission was passed, and as Mr. F. B. Thurber informed the Cullom committee, the board has been "constantly hampered for want of power, and its decisions have been disobeyed and disregarded." If we suppose that the same influence which, in New York, robbed the anti-discrimination bill of its best features, and constituted a commission without power, may possibly have reached the members of the commission, some of its strange recommendations to which we have referred may be explained.

The vital weakness of all these bills, however, as indeed of all measures that have taken definite form for the regulation of the railways, is that they seek to pre-

vent or punish only particular modes of exerting the powers of the railway managers for wrong, without destroying either these powers or the immense temptations to exert them. Certain practices are forbidden, but the motives and opportunities which produce them are left as powerful as before. A thorough study of all the cases of discrimination, favoritism, and combination shows that they are the result of the pressure of circumstances which are practically imperative upon railway managers. These are, in general, of two classes: First, the apparent necessity of these practices, to secure the immediate profit of the corporations; second, the temptation, almost irresistible to any but superhuman integrity, to use their control over transportation agencies for private gain. All the acts of injustice complained of can be referred to one or the other of these two classes. While the constitution of the railway system remains as it is, the pressure upon every manager to give competitive points vital advantages, and correspondingly to burden non-competitive business, to seek especial classes of traffic by surreptitious reductions of rates, and to sustain rates by combinations, will be too great for human resistance. While secret favoritism to a single interest, or to a class of shippers, can bring unlimited wealth to the railway manager, some will yield to temptation and secretly violate the law, expecting the power of wealth to protect them from legal penalties. It must be remembered that the attempt to rectify these abuses comes into contact with causes as deep and broad as the railway system itself, which, working together with remorseless pressure, forms the most resistless social force that the world has ever known. To prohibit by law particular mani-

festations of such forces, while leaving the forces themselves in unchecked operation, is useless.

It may be questioned, indeed, whether there is not an element of injustice, as well as hopelessness, in such an effort. While the existing conditions of society subject the railway traffic to an incalculable pressure of circumstances, forcing these prohibited practices upon them, is it just to require them to be superior to that pressure? I have already expressed my opinion that many of these inequitable and burdensome acts of the railway managers are due to their environment, in such a degree that, while the acts themselves are intolerable, the persons committing them must almost be absolved from individual wrong-doing. However this may be, it is certainly a public injustice to prohibit wrongs while preserving the efficient causes of them. Such a course affords no real and lasting relief to the injured. Under such laws, the same wrongs will be practised secretly; and when they are discovered, the immense resources of those who profit by them will be used in legal subterfuges and delay, or to corrupt courts, commissions, or other public officers, as they have so often been used before. It is all well enough to forbid the growth of Canada thistles; but, if the seed is left in the ground, the thistles will continue to sprout. If men whose whole ambition is wealth are left in possession of powers which may be stealthily misused to gain the object of their lives, with no obstacle but the paper barrier of a law, the secret or defiant misuse of such power is not less certain than the growth of thistles from the seed.

The most important practical result to be expected from the passage of the Reagan bill was the affirmation

by Congress of its right and intention to regulate the railways. Apart from the temporary check which it would have given to the growth of corporate power, which would hardly have been appreciable, it would have been worth something to secure from Congress a practical assertion of its readiness to support legislation by the states, requiring the railways to respect public interests, and to maintain their character as public highways. As a definite beginning of an active regulation of railways in the public interest, this measure, or any other not proposed as a sham and public deceit, would encourage a hope of legislation that might, in the end, prove effective. For this purpose the Cullom bill was nearly as good as the Reagan bill. It was a tactical mistake in the supporters of railway reform in the House, when compelled to choose between the bill passed by the Senate and no legislation on the subject at all, that they did not adopt the Senate substitute. Either bill would have a definite value as the formal commencement of the policy of legislative regulation; and, therefore, either might be supported by advocates of reform who prefer other and more effective provisions. It is asserted that the Senate committee on inter-state commerce will report, as the result of its investigations during last summer, a bill which combines, to a certain extent, the provisions of the Reagan and Cullom bills of last session. It is said that it will retain the commission feature, and reinforce it by strong provisions against excessive rates, discriminations, and rebates, by prohibiting the charge of more for a long haul than for a shorter one, and by requiring publicity of rates. It is said that the new bill avoids the question of pooling, in this respect falling short of the Rea-



gan bill ; but in view of the heroic doses which the committee received of railway theories on this subject, it must be regarded as an evidence of independence that it does not propose a surrender to the combination policy. Such a new measure, combining the leading features of the two opposing bills, may be a valuable proposition, as affording a good chance for initial legislation on the subject. As to its effecting a thorough and permanent remedy for prevailing evils, the considerations that have already been suggested will apply. It seeks to restrain the surface effects of certain influences, but it leaves the influences at work to nullify or evade restraint. For an effective remedy another class of measures must be sought. The attempt must be, not to prohibit and punish particular acts, but to remove their causes ; not merely to forbid discriminations, but to take away the power of making discriminations. When it is made apparent how the unequal and imperfect workings of competition, from which one great class of abuses spring, can be entirely reformed, one step towards an adequate remedy will be plain. When it is shown how to destroy not only the temptation to use the railway power for private gain, but the power itself, the complete remedy will be understood. To insure permanent relief from the dangerous methods of the railway system, legislation must go deeper than effects and remove the causes. By determining those causes and the means of destroying them, the whole problem will be solved.

## CHAPTER X.

### THE PUBLIC HIGHWAY.

WHAT legislative policy will remove the causes of discriminations, destroy the influences which force the railways into combinations, and take away from railway managers both the power and the temptation to enrich themselves and their favorites by the manipulation of rates?

It was shown, in a preceding chapter, that the principal defects and inequalities in the railway system arise from the imperfect and irregular operation of competition. If this be admitted, it is plain that the true remedy lies in making the operation of competition free and universal. To furnish a complete cure, competition must be made free, continuous, and controlling, to an extent at present unknown in railway traffic. If competition is so unrestricted that combinations will but produce fresh competitors, combinations will cease. If it controls all classes of railway traffic, and reaches every shipper, discriminations in favor of one class or shipper, and against others, will be impracticable. If competition enables the railway to carry freight 1000 miles for a given sum, while its absence makes it impossible to carry it 400 miles for the same charge, it is plain that all the interests served by the railway should have the benefit of this great economic principle. Free competition is the cure; and the legislation which is to

extirpate the principal evils of the railways must protect its operation from restriction or interruption. How can this be done by legislation?

The answer to this question lies in the principle of the public highway. In all the older forms of the public highway competition prevailed, and no combinations or monopolies could destroy it. Every citizen could enjoy the privileges of the highway, on equal terms and with identical facilities. Monopolies were impossible upon turnpikes, and plank-roads never were monopolized, because every one had the right to run vehicles over them. Combinations were powerless to charge the public excessive rates for freight or travel. If common carriers on such highways should combine to establish exorbitant rates, a new competitor could put his vehicles on the road, and, by moderate rates, obtain the business. Even if the task of uniting all present and prospective common carriers could be accomplished, merchants and farmers could protect themselves against excessive and unequal rates by using their own wagons, paying the same tolls as the common carriers. On the canals the same principle, as ample experience has proved, maintains the same freedom and stability of competition. No combination of canal boats ever brought the grain trade under the control of a single firm, or enabled one mill to monopolize the grinding of flour. One attempt to pool the freight business on the canal, less successful in defying the law than the railway pools, was promptly crushed by the courts; but the circumstances show that the freedom of competition on the canals made it impossible to sustain artificial rates by such a combination. Under the natural laws of trade new competitors would not en-

engage in the business unless the traffic was profitable. When the business became unremunerative, the excess of competition was removed, some of the carriers retiring, or taking their boats where their services were in better demand. The resort to pooling was both unnecessary and impossible, and the practice of performing transportation for half its cost to cripple competition was therefore unknown. Of a kindred character is the navigation of rivers, improved by a corporation, which collects tolls for its remuneration. No such company ever claimed an exclusive right to run freight and passenger boats over its highway. Its grant is merely the power to take tolls from all boats plying on its waters; and this limitation has kept competition as free on such water-courses as on rivers naturally navigable, on the lakes, or the ocean.

Here are three distinct forms of the public highway, involving radically different forms of construction and methods of operation. The vehicles in use upon one would be useless on the others. The principle of the public highway remains the same, although a steamboat cannot run upon a canal, or a canal packet upon a turnpike, or a stage-coach upon an improved river. Each is a public highway for the transportation and travel adapted to its character. To establish each of these public highways, the power of eminent domain was delegated by the government. The work of constructing and maintaining each of them was assigned to a corporation, with the power to reimburse itself by tolls. In each case, the obligations of the public highway, accepted by the corporation, were recognized and fulfilled, by allowing all persons the right to use the highway with wagons, stages, canal-boats, or steam-



boats, as demanded by the character of each, upon the payment of a reasonable, stipulated, and uniform toll. The result is, that the operation of none of these highways ever involved an attempt to build up a monopoly, or threatened the independence of the traders, manufacturers, or farmers who used them. The railway was established by the exercise of the same governmental power of eminent domain, for the same purpose of a public highway. By similar legislation a company was chartered for its construction and operation, with the right to make a profit by charging tolls for the use of the road. In these respects it is identical, in its public character, with the other highways; but in its practical operation a radical departure has been made. In the older class of roads, the business of building and maintaining a public highway was kept distinct from the business of the common carrier upon it; the latter was open to free competition. The railways have consolidated the two, and made a monopoly of both. In that monopoly lies the source of all the evils which have been set forth in this work. Their exclusion of all competing common carriers, and of the general public, from the use of their track, except by their cars and trains, and on such terms as they prescribe, is the source of all discriminations, the sustaining power of all pools and combinations, and the foundation of all tendencies to monopoly which the railway system has developed. In itself an overthrow of the character of the public highway, it has led to numberless other violations of the public obligations attaching to that character. This consideration makes clear the nature of the remedy to be sought, and the manner in which competition can be secured. The radical and effective remedy for railway evils is this:

Legislation should restore the character of public highways to the railways, by securing to all persons the right to run trains over their tracks under proper regulations, and by defining the distinction between the proprietorship and maintenance of the railway and the business of common carriers.

This will seem to people who are accustomed only to the present methods of the railway system a radical innovation; but it is only returning to the idea upon which railways were first established. "There are some traces," says Mr. W. F. Crafts,\* "of an intention in the earlier charters to allow the public to use their own vehicles and motive power on the railway tracks; but this soon proved to be impracticable." The traces are beyond dispute, being distinct provisions, in all the earlier charters, that every one can run his own cars over the railway; but such provisions were useless because the railways could fix tolls so high as to be prohibitory. But this was "proved to be impracticable," we are told by Mr. Crafts, as well as by other eminent authorities. How was it proved to be impracticable? When was the experiment made, and what proof of impracticability was the result? So far from experience having proved the impracticability of two or more railway carriers using the same track, it has shown that the only serious obstacle to such a practice lies in the desire of all railway companies to monopolize the traffic on their own tracks. The question of the practicability of opening the railways to the free use of competing carriers involves an inquiry as to what restrictions are necessary in their practical operations. Two great objects are to be aimed at in the movement of trains over

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\* *Scribner's Magazine*, October, 1881.

a railway track: First, safety to the public and employees; second, the highest rate of speed that is consistent with such safety. Both these objects are of the greatest importance; and the belief that the privilege of using the track must be kept solely in the hands of the corporation owning it is, in a large measure, sound, if it is shown that the safety and celerity of railway service cannot be secured by any other means. To carry on railway operations at the constant hazard of destroying scores of human lives would rob such improvements of their beneficial character. To adopt methods which would hamper the rapidity of railway services would also be to diminish their public value, though this consideration is less important than the former. If these requisites can only be secured by the present method, of allowing each railway company the exclusive right to run trains and cars over its own track, it may as well be acknowledged at the outset that the practical objections to such a reform as is here proposed would be too great. It is necessary, therefore, to examine the means by which the highest combination of speed and safety is secured, and to inquire whether they are inconsistent with the proposed reform.

It is evident that the running of a large number of trains over a single railway, in opposite directions, passing at stated points and subject to derangement by delay or accidents, requires the highest degree of organization and skill in management. This, it is to be conceded, the railway system, as a whole, has attained. Now what are the methods employed, in the delicate and important work of bringing one or two scores of trains over the same track, from different start-

ing-points to different destinations? They are sent out, in the first place, on exact schedules of time; but the cases in which these schedules are unavoidably modified are multitudinous, and experience has shown that it is useless to rely solely on them for the regulation of trains. All the trains, on any section of railway, therefore, are placed under the control of a train-despatcher at a central point. This officer is notified, by telegraph, of the movement of each train. He keeps an exact record, showing the progress and location of each train, at any moment that the information may be required; and his orders to the officers in charge of each train are transmitted by telegraph to the various stations as it passes, notifying them to what points they are to go, where they are to pass other trains, and where they are to wait for other trains to pass them. Only an outline of the responsible and intricate workings of this office is necessary here. It is enough to say that, in proportion as its organization is perfect, and the obedience of the train officers to its orders implicit, the highest degree, both of speed and safety, in the running of trains is attained.

In addition to the control which railway management now universally rests in the train-despatcher, the practical theory of railway operations is, that each company must have exclusive control of the rolling-stock on its road, and supreme authority over the men employed upon it. It must know the condition of each engine or car. It must have the power to condemn all that are unfit for service, and to repair or replace them. The implicit obedience of conductors, engineers, and brakemen must be secured by the power of the company to discharge them at a moment's notice.



Upon the principles of which this is necessarily but an outline, the railway system has been successful in meeting the important requisites already specified.

It has also been made plain, by experience, that the practical enforcement of these precautions, and the adoption of the highest degree of discipline and the most perfect organization, depend, in some measure, upon causes external to the corporation. Railway companies, like individuals, sometimes practice bad economy. They use cheap and worn-out rolling-stock, they underpay and overwork their employees, and, in other ways, fall short of the necessary efficiency. Such niggardliness often revenges itself by some calamity which kills or cripples a dozen or a score of victims; and then the railway loses more by one such accident than all the saving that can be effected by such false economy. The loss is twofold. The property of the company is damaged and destroyed, its business is obstructed, and it must spend money lavishly in the work of clearing up the wreck and restoring order. On the other hand, it is liable for damage done to persons or property; and jurors are so prone to give heavy damages in such cases, that it is the rule with railways to compromise such suits on the best terms possible. It is worth remembering, in this connection, that the strongest possible inducement for a railway to perfect its organization, establish the most thorough discipline, and adopt the most perfect safeguards, is the heavy penalty it incurs by the losses from accidents. The same consideration applies to its employees. The loss of position, which results from disobedience or neglect, is a grave matter to any man; but it is of slight importance beside the loss of life or limb. As regards the men in charge of

trains, the most overwhelming incentive to strict discharge of duty and careful obedience to orders is the knowledge that their own lives, as well as the lives of those in their charge, are at stake.

Now how do these considerations apply to the proposition to open the railway tracks to the general competition of carriers? Manifestly, to let any one run engines or cars over any railway, free from supervision or direction, would produce hopeless wreck and disorder. Such a proposition would be presumptive of lunacy. But when we inquire whether a plan cannot be perfected which shall retain all needful precautions, and enforce by law the authority of the central officer over trains in motion, while giving to carriers the right to compete in the carriage of freight, the question assumes a very different aspect. What is there in these methods which cannot be preserved without the exclusive privilege of carrying freight over the track? The maintenance of schedules need not interfere with the freedom of competition. The carrier wishing to run a train of his own could be required to run a regular train on schedule time, or to follow a regular train with an extra, just as extras are now run on every railroad in the country. The control of the trains in motion must be given to a train-despatcher; but the trains thus controlled may be owned, loaded, and forwarded by different carriers. If the law secures implicit obedience to the orders of the train-despatcher, while the trains are on the railway, can it make any difference to the safety and speed of the service that one train is owned by A, another by B, and that both carry freight at such rates as are fixed by free competition? Cannot the authority which controls the trains be made as

absolute and unquestioned as now, or even more so, without vesting the monopoly of transportation in a single company? Cannot the obedience of the men in charge of the trains, and their intelligence and care, be secured in as high a degree if competing carriers are allowed to use the same track? And cannot the use of safe rolling-stock and its maintenance in good repair, by frequent inspections, be enforced just as well under a system of competition as under a system of monopoly? These are the questions which must be answered, in order to determine whether the idea of competition in transportation over the same track is practicable.

This proposition does not contemplate sending a number of trains under conflicting control upon the same track. It simply proposes that the right of outside carriers to load their trains, at whatever rates they choose, and to send them over the tracks of the railway, shall be established, under whatever regulations are necessary for the preservation of speed and safety; and asserts that all these regulations can be enforced consistently with the practice of free competition. The first condition that it assumes is, that all such competing trains would be started on schedule time, and run either as regular trains, or as extra trains following the regular ones. It next supposes, as a vital condition, that all trains will be under the control of the train-despatcher, from the moment that they come upon the track until they reach their destination. All the details of reporting the progress of each train, at every telegraph station which it passes, of keeping the record of its location in the central office, and of governing its movements by telegraphic orders, can be enforced as well, whether the trains are owned by a single corpora-

tion or by a dozen. Let the law, or the rules of the railway company, provide absolute control by the train-despatcher, of trains in motion, and the efficiency of that officer need not be in any respect diminished by the fact that the trains are owned and laden by competing carriers.

The same care could be exercised, under legislative regulation, or the rules of the proprietary company, for the safety of the rolling-stock and the discipline of the employees. The powerful motives which now secure the utmost precautions and the highest discipline on the part of the railways will apply as strongly to the carriers and their employees. The penalties now incurred by the railways, through carelessness or stinginess, would fall with just as much severity on negligent or niggardly carriers. The loss to them from accidents, caused by allowing their cars or engines to get out of repair, or by sending out their trains in charge of incompetent or careless men, would be far greater than the saving from any such vicious economy. They would be liable, not only to their shippers, but to the railway, for all damages caused by their neglect, while the same liability would attach to the railway company for letting its track become unsafe. Similar considerations apply to the officers in charge of trains. Their situations would depend on their care, watchfulness, and strict obedience to orders; but a far stronger motive, regard for their own lives, would stimulate their discipline and intelligence. With such powerful incentives to the adoption and observance of every precaution, it ought not to be difficult to insure strict obedience to all proper regulations, and to move trains with the same safety and despatch that is obtained under the present system.



These regulations could be established in a variety of ways. With the right of all carriers to transport freight over any railway fully recognized, it might be permissible to leave the rules which must be observed by them, in the movement of trains, to the dictation of the railway corporations. The company might be allowed to establish a standard of inspection, and to provide inspectors to secure the safety of rolling-stock, and to exclude all rolling-stock that did not meet the requirements necessary for safety and despatch. It could have authority to license qualified engineers and conductors, to be employed by carriers on its track. Let the right of any person to carry freight over its tracks be established, provided its standard of efficiency and discipline is reached, and the public need not complain, however high the standard is. The higher and more exacting the requirement, the more perfect will be the security and promptness of the service. Or these regulations could be made the subject of direct and specific legislation. The law might establish an authority to direct the motion of trains, and enact penalties for disobedience. It might provide a system of inspection for all cars and engines, and forbid the use of those which are worn out or unsafe. It might establish a system for licensing engineers and conductors, just as it now does for licensing masters, pilots, and engineers of ocean and river crafts. The qualities of care, intelligence, and technical knowledge required for taking charge of a railway train are different in kind, but not necessarily higher in degree, than those for managing a steamer on the ocean, or on the swift and narrow rivers of the West. Judging by the wages paid to conductors and engineers on the

railways, and those paid to masters and pilots of steamers, the qualities required for the railway service are much less difficult to obtain. Yet the law of every civilized country has a system for testing and certifying the efficiency of men intrusted with the water craft, and when the corresponding risks of the two systems of transportation are considered, the efficiency and safety secured by the laws regulating water transportation do not compare unfavorably with those attained under the system of monopoly on the railways. It is not necessary to our purpose to inquire at length whether, in establishing the right of all carriers on the railways, the enactment of regulations, the inspection of trains and the examination and licensing of conductors and engineers should be left to the railway company or reserved for officers of the state. It is enough that in either way the same unquestioned control of trains, the same watchfulness, obedience, and care in running them, the same precautions for the repair and security of engines and cars can be attained under free competition as under a monopoly.

The methods of conducting an open but properly regulated competition, on a large railway system, may be conceived as varied in many ways. At any important point of shipment, there might be a number of firms or companies owning engines and furnishing motive power for the loaded cars of shippers. One advantage would be that a small capital could then compete on fair terms with the greatest. An engineer and a conductor, licensed to run over the railroads of New York, and able to buy an engine, could engage in the business of hauling cars between Buffalo and New York, or any other cities of the state, as well as a

corporation with a capital of millions. The law might require that carriers should give bonds for their good conduct, should satisfy the proper authorities of their efficiency and sobriety, and should submit their rolling-stock to constant inspection, and keep it in thorough repair. The plan admits of the widest range, from the private carrier who runs a train between two stations at stated intervals, to the great transportation company, which may contract to take freight from or to any railway station in the country. Neither the number of competitors engaged in the business, nor the relative extent of their operations, would conflict with the thorough enforcement of all precautions, and the most complete control of trains while in motion.

Cogent evidence that it is not necessary to vest the exclusive right of transportation over a road in one company is found in the practice of the railways themselves. Experience certainly has not proved the free use of the railways by competing carriers to be impracticable, for no fair experiment was ever made of the plan. The railways have steadily inculcated the idea of the necessity of monopoly in the operation of their roads; but the unfounded nature of the claim is evident from the fact that, even under the hampered conditions which have prevailed, there are numerous instances in which more than one railway company have used a track jointly for a term of years. The personal observation of the writer comprises five instances in which this has been done, with good results both as to safety and speed; and any one who will take the trouble to inquire can probably find examples, where two or more railway companies use a section of track in common without difficulty. Three of

the cases within my knowledge comprise important portions of the trunk-line thoroughfares from East to West;\* and the simultaneous use of these tracks by different companies shows that the only reason why such a joint use of tracks by the railways is not more common is the jealous exclusiveness of the railways, especially in preventing competition for local traffic. The contracts under which these tracks were used in common expressly excluded competition in local business. In these cases the purpose of the railways was shown in their effort to exclude that influence; but the practicability of allowing more than one carrier to run trains over the same track was also proved. Monopoly is not essential to safety in railway service; and, in the few instances in which the exclusive policy of the railways, and their rivalry, have permitted the use of a track by more than one company at the same time, experience demonstrates that it can be safely done, under regulations practically similar to those now enforced.

The common practice of the railways refutes still more convincingly the claim that the exclusive owner-

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\* The most important example of the joint use of a railway by two great corporations is afforded by the track between Newark and Columbus, Ohio, thirty-three miles long, which has been owned and operated in common by the Baltimore and Ohio and the Pittsburgh, Cincinnati, and St. Louis railways for twenty-one years. Another instance is the fact that the Cleveland and Pittsburgh and the Pittsburgh, Fort Wayne, and Chicago railroads, previous to their lease to the Pennsylvania Company, used the same track from Rochester, Pennsylvania, to Pittsburgh, twenty-five miles in length, for about twelve years. They are still using it under one management. The third instance was the use, at the same time, by the Cleveland and Toledo (now the Lake Shore road) and the Cleveland, Columbus, and Cincinnati railroads, of the track from Grafton, Ohio, to Cleveland, a distance of twenty-four miles, for about twelve years.



ship of all rolling-stock used on a road is necessary to safety. This idea, which has been enunciated by the high authority of a judge upon the bench, in a decision to be noticed hereafter, is amply disproved by the practice of nearly all the railways. There is not a railway, transacting more than the merest local traffic, which does not permit the cars of other companies to pass over its line. The cars of New England railroads are found in Nebraska, and those of Southern railways are run over New York roads without a question. This freedom in the passage of cars, like the joint use of occasional sections of track, is permitted, reserving the exclusive privilege of each railway to dictate the rates that shall be charged over its own line; and the practice shows that exclusive ownership is not necessary to security or safety.\* The same precautions which allow the cars of twoscore different railway companies to pass over a single trunk line, while free competition is obstructed, could secure just as high a degree of safety if the cars belonged to scores of competing carriers.

All the details necessary to produce efficiency and security of operations could be secured by law, or by the rules of the corporation owning the road; and all such precautions are consistent with the ownership of any number of carriers, and thus with free competition at every station, side-track, mill, or warehouse along the road. As to any necessity for placing the regulation of freight rates, or the reception, shipping, and de-

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\* The entire practicability of allowing numerous carriers to own cars and transport freight over the same road was shown in the early history of railroading, in the experience of the Allegheny Portage, and the Philadelphia and Columbia roads, owned by the state of Pennsylvania, which is referred to at the end of this chapter.

livery of merchandise, under the same control as the construction and maintenance of the railway, there is no foundation in reason for it. There is no more connection between the two branches of business, than there was, two generations ago, between the building and maintenance of a turnpike and the running of stage-coaches or freight-wagons over it. In this natural and legitimate division of the service lies the solution of the railway problem. The business of constructing and maintaining a road is one enterprise. The business of carrying freight over the highway thus constructed is another and a distinct business. The first, from its character, necessarily implies some exclusive rights. Only a single controlling power can lay out a line of railway, direct its construction, furnish the funds, and keep its track in thorough and uniform repair. Having built the railway, it is but just that the corporation should hold the easement in the tracks and right of way, and the franchise to take uniform and reasonable tolls. But there is nothing in the nature of the business to require that only a single common carrier shall engage in the business of running engines and cars over the track, with the power to levy prohibitive rates, or to establish unequal privileges in its use. This business should be open as freely to every man on the railways as it is on other highways, whether canals, turnpikes, or navigable rivers, subject in this case, as in the others, to all regulations which, in the nature of the highway, are necessary for public security and efficiency.

To reform the railway business completely, legislation must secure the perfect and unrestricted operation of competition, and at the same time maintain all the

legitimate rights of the corporation. It must allow every person desiring it to run trains and engines over a railway, at uniform rates of toll, such as will, in the aggregate, provide for the maintenance of way, and yield a good return on the invested capital. In short, the proposition is to devote the railway to the public use, in the same sense and to the same degree as turnpikes, canals, and rivers are open to public use, and to make it a public highway in fact as well as in name. The right to this use was plainly reserved in all the earlier charters, and, in early and authoritative judicial decisions, was declared essential to the character of the public highway. The roads which were constructed in the first stages of railway development are obliged, by their charters, to allow every one the use of their tracks, upon the payment of a fixed toll. The departure of the present railway system from the original intent of legislation is nowhere more conspicuous than in its perversion of this language in the charters. In all the early charters, and in many later ones, the sole authority of the railways to charge for transportation is in the grant of power to take "tolls." This has been interpreted, in practice, as authority to fix charges for carrying freight and passengers; but the words have no such meaning. A toll is a fixed sum for the use of a highway or bridge, collected from those using it,\* and cannot be made to cover the charges for transportation imposed by a carrier. The charge made by

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\* Toll—"a tax paid for some liberty or privilege, particularly for the purpose of passing over a bridge, or on a highway, or for that of vending in a fair, market, or the like."—*Webster's Dictionary*.

"A fixed charge made by those intrusted with the maintenance of roads, streets, bridges, etc., for the passage of trains, goods, or cattle."—*Imperial Dictionary*.

a steamboat, for transporting freight or carrying people from one port to another, is not a toll. Neither can the freight charges imposed by a canal-boat, or the fares collected of passengers in stage-coaches on an improved highway, in any correct sense be spoken of as tolls. The rates which these canal-boats, or stage-coaches, or other carriers, have to pay for the use of the highway are tolls. The general use of this word in railway charters shows the original purpose of that legislation. The roads were authorized to collect tolls, and not freight charges or passenger fares. Their function was to afford a highway for the general use of carriers and the public, and to take tolls for their reimbursement, and not to assume the exclusive right of transportation over the highway placed by the state in their charge. But the rates of toll which, at that stage of commercial progress, were regarded as reasonable, have now become prohibitory, so that the ability of the company to charge their charter tolls to any other carrier has given them a monopoly of transportation over their own tracks for a generation.

A representative of the Reading Railroad, in a recent investigation by a municipal committee of the anthracite-coal discriminations against Philadelphia, said that any one who was not content with the rates of the company has, by its charter, the right to run cars on its track and haul his own freight. "But," added the railway official, so as to make his jeer more evident, "he must pay a toll of six cents per ton-mile." This he considered a complete answer to the demand for the free use of the railway by the public; but if he had studied the question further, he might have learned that it appeals to principles and authorities above the



provisions of a railway charter. "If the toll amounts to a prohibition," says the syllabus of the decision of the Supreme Court of the United States, in the Camden and Amboy case, "it is a monopoly and the road is not public." And again, "The declaration in the charter, that the railroad is a public one, does not make it so, if the effect of the charter is to give the exclusive use to the corporation." In that case, the rate of eight cents per ton-mile on freight was regarded by the court as having "strong features of a monopoly." But, as was natural in that era of commercial progress, the judges did not regard the feature of monopoly as distinct enough to warrant the declaration that the charter was unconstitutional and void. But if actual experience had demonstrated to the court that this rate, or any other fixed by the earlier charters, was prohibitory, and gave the corporation a monopoly of transportation over its tracks, is there a doubt that it would have set aside the charter? The principles of the decision are too clear to leave any doubt on the question. The assertion in the charter, that the use of the road is to be public, does not settle the matter, the court declares; it is the practical operation of the road that is decisive. If the rate of tolls is such as to prohibit the free use of the tracks by the public, and to give the corporation the exclusive use, the tolls are not reasonable, the road is a monopoly and not a public highway, and the act authorizing the appropriation of private property for its right of way would be, as Chancellor Walworth said, a violation of the contract whereby the land was granted to the individual, and repugnant to the constitution of the United States.

This principle was, at an early day, the foundation

both of legislation on the subject, and of its judicial construction. This was conceded by Mr. Crafts, who said :\* "It was expected that the public would furnish its own motive power (horses)," and then passed on, evidently supposing that the word in brackets demonstrates the folly of expecting any one but the railway company to use the motive power of steam. But the suggestion is unsound. If the fact that horses were at first expected to be the permanent motive power on railways, furnishes a legal obstacle to the use by the public of an improved power, when developed, it presents the same obstacle to the adoption of such an improvement by the corporation. Questions of construction are to be resolved in favor of the public right. It would be a legal enormity to construe the same instrument, as limiting the public to the use of an obsolete motive power, and giving the corporation the right to use improved machinery and a modern system. It is true that the change from horse-power to steam locomotives led the public to neglect its privilege. In the first three decades of railway development, the public did not care to invest money in locomotives. The only carriers who were able to buy rolling-stock and run trains by steam were the railway companies themselves. The corporation, whose property would otherwise lie idle and unremunerative, was naturally the first to make the additional investment necessary for the carrying business. No doubt the railway managers were also the first to discover the tremendous power over commerce, to be attained by the exclusive control of transportation over their tracks, and to that discovery is probably due the appearance of grants of that

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\* *Scribner's Monthly*, October, 1881.

exclusive privilege in the more modern charters, and the industrious circulation, during late years, of the idea that the safety and efficiency of the railways depend on it.

In the first stage of railway development the public right was reserved; but in the later stages it has been lost in practice, and many more recent charters positively grant to the corporation the exclusive right, or in other words the monopoly, of transportation over its own highway. But the question arises, can the legislature grant such a right? Can the sovereign power to construct public highways be so exercised that no vehicles shall move or transport goods, unless owned and operated by the single corporation? It is plain that, in the case of a turnpike or canal, the exercise of such a power would have been declared beyond the authority of the legislature. It was clearly shown by Chancellor Walworth, Justice Baldwin, and other judges of the highest authority, that the legislature has no power to establish monopolies under the guise of public highways. Yet this exclusive right of use is as clearly a monopoly in a railway as in a canal. If, as Judge Baldwin asserted, the permission to the company to exact prohibitory rates would vitiate and destroy the entire charter, how much more clearly would the exclusive grant of the privilege of transportation, or the seizure of such an exclusive use under a construction of the charter, make the charter itself unconstitutional? According to the broad and consistent theory of law, laid down by the older jurists, the right of eminent domain cannot be used to give any corporation exclusive rights in a public highway, save such as are necessary to the construction and maintenance of

the road. If either by theory or practice the use of the highway has become the sole privilege of one corporation, then, if the monopoly is granted by the charter, the charter is void; while, if it is established without the authority of the charter, it is a violation both of the charter and of public rights.

It must be admitted that later courts of the highest authority have taken a different view. It has been held by the Supreme Court of the United States, and in various forms by other judges, that the exclusive use of its railway by a company does not destroy its character as a public highway, but simply constitutes a regulation necessary for the safety and efficiency of the service. In this assertion some eminent judges have not confined themselves to defining the law, but have attempted to settle a question of fact—the question whether such exclusive rights are necessary to safety. The Supreme Court of the United States, however, did not undertake to decide this question, but left it to the legislature. In a decision, pronounced twelve years ago, affirming strongly the principle that the railway is a public highway,\* Justice Strong said: “That all persons may not put their own cars on the road, and use their own motive power, has no bearing upon the question whether the road is a public highway. It bears only upon the mode of use, of which the legislature is the exclusive judge.” This language suggests a conflict between the Supreme Court in 1842 and the Supreme Court in 1874. Justice Baldwin held that a mode of use under the charter, which gives the corporation an exclusive use of the road, is a monopoly and renders the charter unconstitutional. Justice Strong

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\* *Olcott vs. Supervisors*, 16 Wallace. 673.



holds that such exclusiveness is a practical question of which the legislative power is to judge. As the point at issue is, simply, what is the actual result of this exclusive control, the public is at liberty to choose between the view of Justice Strong and that of Justice Baldwin. I must accept that of the earlier judge. It is inconsistent with the character of a public highway that the public cannot travel or transport its goods, except in the vehicles of the corporation which built the road, and by paying whatever rates it demands, limited only by an obsolete and exorbitant maximum. A monopoly in travel and transportation is at war with the very object of a public highway. But even although, upon a direct issue, the later view should prevail, that such exclusive rights do not destroy the character of the road as a public highway, the remedy is still within the reach of the people. The exclusive privilege is "a mode of use," of which, according to Judge Strong, "the legislature is the exclusive judge." The subject, then, is entirely within the regulating power of legislation. While the two decisions differ as to the view which constitutional law takes of the railway monopoly in transportation, they agree that the legislature can enforce the separation of the proprietary control of the railway, with its right to take tolls, from the business of the carrier upon it.\*

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\* Another assertion of the same idea is found in Judge Emmons's very exhaustive opinion in *Talcott vs. Township of Pine Grove* (1 Flippin, 151). He said: "It is intimated that if the cars of all other companies could enter upon and use the road, this too would make the difference between legality and unconstitutionality. Protesting again that we are utterly unable to see in this anything more than a mere mode of use, in reference to which the law-making power beyond doubt is the sole judge, as Judge Cooley as an author so clearly shows, nevertheless we add that

The claim that this monopoly is essential to the proper conduct of the railways, was set forth judicially with distinctness by Judge McCrary, in one of the leading express cases,\* in which he founded the railway company's right of excluding all other carriers upon "the safety, not only of property, but of life as well." In this opinion, the judge, very sincerely and in good faith, undertook to settle a question of practical railroading

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this criticism also we think is as unfounded in fact as the former one." The court then says, that the general law secures connections and facilities for other roads; an assertion which may be seriously questioned.

\* In the case of the Southern Express Company against Memphis and Little Rock Railroad (8 Federal Reporter, 799), the judge quoted the sixth section of the charter as follows: "The said company shall have the exclusive right of transportation or conveyance of persons, goods, merchandise, or produce, over said railroad by them to be constructed." With regard to this section the court said: "This language must be construed in the light of the history of the construction of railroads in this country. When first introduced they were regarded only as improved highways, subject to be used by the general public. It was thought that any person ought to have the right to place his vehicle upon the track of a railroad, and to transport his own freight upon it, paying toll for the use of the track; and it was considered necessary, in order to limit the use of the road, to give a particular person or company the exclusive right to operate it; that such exclusive right should be reserved by law. Experience very soon demonstrated that it was not practicable to apply to the system of railways all the principles that obtained in defining and regulating the rights of the public with respect to the common highway. Certain innovations were necessary. Certain exclusive privileges were inevitable, in order to secure safety and liberty in the transportation of persons and property by the use of cars and steam-engines. One of the first of these to be generally recognized was that the operation of every railroad should be under the control of a single head. It was seen that the safety, not only of property, but of life as well, depended upon vesting in the owner of the track, or the company operating the road, the exclusive right to say what vehicles should be placed upon the track, or, in other words, the exclusive right of transportation and conveyance of persons and property over their lines. An examination of the railroad charters, adopted by the various legislatures of the Union, will show that this provision has been inserted in nearly all of them, in one form or another."

as if it had been a question of law, and, as usual, when the cobbler goes beyond his last, made some striking errors. Experience has doubtless proved that it is impossible to apply to the railway the precise regulations which serve well on the common highway. As experience had proved the same thing of canals, before railways were invented, reason could, from the first, tell all who studied the subject that still other rules must be adopted for a new kind of highway. A witty newspaper writer, two or three years ago, sought to disprove the theory that the railway is a public highway, by saying that if it is so, it is necessary, when two trains meet each other, that each shall turn out to the right until they have passed. He might as appositely have made the same remark of canals, or have said that if two railway trains meet each other, one must stop and slacken its tow-rope, while the other passes over it. As railway trains have neither tow-ropes nor tow-paths, so they have no constant facilities for turning out to the right; but in each case, whether of railway, canal, or turnpike, the peculiar form of highway and method of use require not only appropriate vehicles, but also appropriate and peculiar rules for their movement and government. The stage-coach requires one set of rules; the canal-boat another; the steamers on the lakes or rivers must have a third and wholly different code of regulations; and the railway train calls for a fourth, equally distinct in character from all the rest. But how does this necessity for adapting regulations to the methods of use demonstrate "the impracticability of applying the principles that obtained in defining and regulating the rights of the public" in other highways to the railways? To adapt regulations to particular uses is one

thing; to abandon the principles which underlie their existence is another. While the rules for use vary with the nature of canals, turnpikes, and rivers, the principle that the public shall freely use the highways, under these rules, is preserved in them all. Wholly distinct rules are necessary for the movement of trains on railways; but the principle that the public has a right to the free use of the tracks, either for private transportation or as common carriers, should be universal and permanent.

There are other gaps in the judge's logic. It was found inevitable, he says, "to secure safety and celerity in the transportation of persons and property by the use of steam-engines," that the operation of every railroad should be under the control of a single "head." This must be admitted of the control of trains in motion; but it by no means follows that the engines and cars must be owned by a single corporation, or loaded by the employees only of the railroad, or that the freight may not be taken and transferred by many competing carriers over the same track, at whatever charges may be fixed by free competition. Again, the judge says, "It was seen that the safety, not only of property, but of life as well, depended upon vesting in the owner of the track, or the company operating the road, the exclusive right to say what vehicles should be placed upon the track, or, in other words, the exclusive right of transportation and conveyance of persons and property over their lines." This statement is in part indisputable. The railway company must have power to require vehicles suited to the road. It must be able to exclude from its track a stage-coach or a steamboat, cars that are out of repair, or engines in



danger of explosion. But the judge goes too far. It does not follow that the company must own the engines and cars. If the train-despatcher fully controls trains in motion, it can make no difference to the safety of the service who owns the trains, or what charges are made by the owners. The necessity for exclusive ownership by the company is fully disproved by experience, since two or more companies have often used in common considerable sections of road with safety and success. Indeed, on every important railway, cars belonging to scores of different companies are running every day in the year. This being the case even while competition upon the railway is suppressed, it can be done just as well and in the same way, if the law restores competition and gives it full play.

Let the railway corporations retain all powers necessary to direct the movement of trains with safety and speed; but, under this direction, let the carrying business be open to all competitors. This plan simply separates two distinct kinds of commercial service. It is no more necessary to combine the work of receiving, classifying, and loading and delivering freight, and of fixing and collecting charges, with the work of controlling the trains in motion, than it is to combine the mining of coal with the manufacture of iron in blast furnaces, or the smelting of iron with the making of rails in rolling-mills. If any one should claim, for the proprietors of a rolling-mill, the exclusive right to manufacture pig-iron, or to mine coal or ore for their works, every one would see in the claim a mere pretext for concentrating these industries under the control of a few large corporations. The only way to protect industrial freedom is to open each branch of industry to

every man on equal terms. The owner of the rolling-mill may own and work blast furnaces or mines if he will; but others may still build furnaces or open mines in free competition. The same principle should be applied to the railway. The pretence that only a single corporation must have power to carry freight or move trains over a road is set up solely to support a needless monopoly.

At present the only powers essential to the proper discharge of its functions by the railway company are the exclusive control of its tracks, the right of directing and inspecting the rolling-stock, and the franchise to take uniform tolls. It is possible that the advance of invention might make it necessary to extend these powers. While the motive power on railways consists of steam locomotives, there is no more reason why, with proper guarantees for safety, the power should not be furnished under free competition, upon these roads, than in transportation by steam on the rivers. The skill and care required for the management of locomotives is not greater than for river steamboats, while the risk of accidents, especially in carrying freight, is much greater in the latter case. If, in the progress of invention, electricity should displace steam on the railways, and an electric current on the track should become the best motive power, it must necessarily be furnished by the company owning the road. Only one authority could provide such a motive power on any one line, and the work would naturally belong to the company which constructs and maintains the track.

The question of tolls presents little practical difficulty. The toll should be a reasonable and uniform rate

per ton per mile for freight, and per car per mile for empty cars, such as will, in the aggregate, yield revenue enough to repair and maintain the track, to pay fixed charges, and leave a fair dividend upon the *bona-fide* capital invested. The toll should not be the same upon all roads. The road which takes from the point of production 250,000 tons of freight, which would be worthless but for this outlet, is both forced, in order to earn a return on its investment, and justified by its service to the producer, in charging a greater rate per ton-mile than the trunk line which moves five or ten million tons and forms part of a great highway of the nation. While the rates on different lines must vary, the reasonable toll for each could easily be calculated from its expenses, fixed charges, and gross tonnage.\* The

\* The following figures are given for the purpose of approximately showing the rate of toll per ton-mile on freight which various railroads, accommodating different kinds of traffic, must charge in order to keep the roads in repair and obtain a good return on their capital. In the case of one of the most prosperous trunk lines, the low charge of less than  $\frac{2}{10}$  cent per ton-mile, for the use of the track by outside carriers, would be remunerative to the company. On the least prosperous of the trunk lines, with an immensely watered capitalization, and supposing it to earn 6 per cent. interest and dividends—which it has never done—.431 of a cent per ton-mile would yield the needed revenue. On minor railways, the rate may rise as high, for example, as 2.42 cents on the Denver and Rio Grande Railway, where the cost of construction is high and the volume of business small.

#### MAIN LINE OF THE PENNSYLVANIA RAILROAD.

Ton-miles of freight.....	5,066,083,175
<i>Expenditures.</i>	
Maintenance of way.....	\$3,660,491 47
General expenses.....	603,659 89
Interest on stock and bonds, \$150,000,000, at 6 per cent.....	9,000,000 00
Total.....	\$13,264,151 36
Deduct 60 per cent. of passenger earnings of \$6,115,323.....	3,669,253 80
Tolls required from freight.....	\$9,594,897 56
or 0.189 cent per ton-mile.	

periodical adjustment of the tolls for any railway should be based upon the traffic for the corresponding period immediately preceding. Let public interests be fully protected against combinations and discriminations, and there need be no public objection to making a liberal

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NEW YORK, LAKE ERIE, AND WESTERN.

Ton-miles of freight.....	2,306,946,892
<i>Expenditures.</i>	
Maintenance of way.....	\$2,720,173 91
Fixed charges on debt.....	4,605,392 52
6 per cent. dividend on \$85,000,000 stock...	5,100,000 00
Total.....	\$12,425,566 43
Deduct 20 per cent., proportion of passenger earnings to gross earnings.....	2,485,113 28
Revenue required.....	\$9,940,453 15
Rate required per ton-mile.....	0.431 cent.

LEHIGH VALLEY RAILROAD.

Ton-miles of freight.....	704,020,323
<i>Expenditures.</i>	
Maintenance of way.....	\$1,918,080 31
General expenses.....	206,613 51
Interest.....	2,031,674 72
Dividends.....	2,210,378 00
Total.....	\$6,366,746 54
Deduct 60 per cent. of passenger earnings....	467,783 87
Revenue required.....	\$5,898,962 67
Rate required per ton-mile.....	0.838 cent.

(To pay 6 per cent. on capital and debt,  $\frac{7}{10}$  of a cent per ton-mile would be ample, as the above calculation includes 10 per cent. dividends on preferred stock, 8 per cent. on common, and 7 per cent. on \$6,000,000 of the debt.)

CHICAGO AND NORTHWESTERN RAILWAY.

Ton-miles of freight.....	1,183,820,353
<i>Expenditures.</i>	
Maintenance of way.....	\$3,252,226 24
General expenses and taxes.....	2,417,288 98
Interest.....	4,288,633 05
Dividends (preferred stock, 8 per cent.).....	1,781,162 00
Dividends (common stock, 7 per cent.).....	1,107,377 00
Total.....	\$12,846,687 27
Deduct 60 per cent. of passenger earnings....	3,671,769 45
Revenue required.....	\$9,174,917 82
Rate required.....	0.774 cent.



margin in calculating tolls, granting the corporation the benefit of any gain in traffic as an addition to its profits. With the public rights fully secured, and the prevailing evils removed, the prosperity of the railway corporations would be entirely consistent with the public welfare. Nor do the necessary differences in tolls upon different railways present any insuperable difficulty. The fact that the Erie Railway, to pay dividends, must charge twice as great a toll as the Pennsylvania Railway, would indeed raise the question whether tolls must produce dividends for fictitious stock. The tolls ought certainly to earn dividends upon actual constructive capital; but in this matter also, free competition will, in the end, work out a just result. For if a road charges a materially greater rate per ton-mile than its competitor, in the effort to make dividends on watered securities, it will simply drive the traffic to its competitors. Let it be settled that the tolls shall be

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DENVER AND RIO GRANDE RAILWAY.

Ton-miles of freight.....	193,178,436
<i>Expenditures.</i>	
Maintenance of way.....	\$1,440,950 61
Miscellaneous expenses.....	281,380 27
Interest on bonds.....	1,762,891 66
Dividends, 6 per cent.....	2,130,000 00
Total.....	\$5,615,222 54
Deduct 60 per cent. of passenger earnings...	957,126 75
Revenue required .....	\$4,658,095 79
Rate required.....	2.42 cents.

In these cases the proportion of expenses to earnings is about 60 per cent., and, accordingly, that percentage of passenger earnings is deducted for the passenger traffic. In the case of the Erie a slightly different method was used, the ratio of passenger earnings to gross earnings being deducted; while in the case of the Denver and Rio Grande, the ratio of expenses being 65 per cent., that proportion was deducted. These figures are, of course, only intended to indicate approximately how tolls might be calculated.

the same to all alike on any single line, and competition will insure their practical equality on competing roads. In a case where the traffic is as yet undeveloped, the rate of toll necessary to earn dividends might be prohibitory, as is shown by the figures taken from the Denver and Rio Grande report for 1883. The practical effect might be to leave the company the exclusive privilege of carrying freight, for the first years of its existence; and this would be no more than justice. It would inflict no serious hardship on the public, that the company which embarks its capital in a new enterprise shall have reasonable profits, provided it be permitted to make no unjust discriminations, nor to charge oppressive rates. When its traffic becomes so great that moderate tolls will yield a fair profit on the investment, its track will be thrown open to the services of all carriers, and its profits will be maintained. This insures practical justice to all interests. All these details with regard to tolls are, of course, subject to further discussion before they can be settled; but it seems clear enough that general rules may be framed for fixing tolls, in accordance with the circumstances of each railway.

It is not hard to picture the effect of such a reform upon the railways. Let the right of every person to run a railway train over any track to which he may take his engines and cars, be placed upon the same basis as the right to run a steamer over any river, or a canal-boat over any canal, and the practices of combination and discrimination, which distinguish the use of the railways from that of other highways, will vanish. It is not claimed that this would bring a millennium in transportation. Common carriers would still

grasp excessive profits, if they could; and some railway officials would doubtless be willing to enrich themselves by an illegitimate exercise of any powers within their reach. But the leading evils which are the subject of this work would be effectually and permanently cured, by demolishing their causes; with the right of carrying freight over the railways, free to all on equal terms, the power of railway corporations to enforce discriminations, and to build up other monopolies by combinations with other railways, would be destroyed.

The first effect of the reform, if it merely gave each railway the right to send its trains over connecting tracks, would be to destroy the possibility of artificially sustaining rates by pools. Even if it were possible to bring all existing competitors into a single combination, the certain knowledge that new competition would at once spring up would render such combination useless. Arbitrarily to increase rates would only be to bring new capital into the business of transportation, and thus indefinitely to expand competition. When the law enables \$100,000 of capital to compete fairly with the mightiest pool, the power of that pool over commerce is no longer dangerous. On the other hand, such combinations being powerless, rates would be determined, on a natural and legitimate basis, by the cost of service. The fact that all efforts to drive competition permanently from the field must be futile would make the charges for transportation stable. No gigantic corporation could assert its control of the business, and drive its competitors to accept its terms, by striking off half or three quarters of its freight charges at a blow; or disturb the calculations of trade by

restoring the old rates with scarcely less abruptness. No corporation has such vast resources that it can undertake to drive a hundred present, and ten thousand possible competitors out of the field by such means. Where competition is free, as in all legitimate business, the fluctuation of rates will be gradual and slight, compared with the violent changes now inflicted upon commerce. New economies and inventions for improving transportation would exert their proper effect, in reducing charges gradually and progressively. If competition were excessive, rates might be brought down to the cost of service; and as the lack of profit reduced the competition, the restoration of charges to a paying basis would be as gradual as their decline. The first effect of making competition universal by this means would, therefore, be to make pooling impossible, and to do away at once with the oppressive rates which the pools maintain, and with the ruinous rates which their conflicts produce. Violent fluctuations would cease, and changes in freight rates would become as moderate as the rise and fall of any other commodity, whose price is regulated by the unrestricted laws of demand and supply.

Another effect of this reform, no less valuable, would be the permanent abolition of all vital inequalities and favoritism to shippers, by destroying the power of the railways to make such discriminations. It has been seen that this power rests entirely in the exclusive control, by each railway, of transportation over its own track; so that a number of railways can combine to favor or oppress an interest or an industry. Make the privilege of transportation free to all, and this power is utterly destroyed. If a shipper cannot get as good



rates or facilities as his competitors from one railway carrier, he can get them from another. If all the carriers at a single point should combine to oppress any interest, carriers can be found elsewhere to bring their trains to its relief. Even in the impossible contingency that all who are engaged in transportation should refuse to compete for traffic, still merchants or manufacturers could run their own trains. As long as any shipper can, by investing a few thousand dollars, secure the carriage of his freight at nearly first cost, no railway or common carrier can destroy his trade by discriminating rates. In any month of the period in which the independent petroleum refiners were struggling against the growth of the Standard monopoly, there were railways enough which would gladly have transported their freight on fair and equal terms, if they could have reached the refineries with their cars. At any time before they finally succumbed to the Standard the refiners could have raised the means to buy all the cars and engines required for their transportation, if they could have taken their cars over the railways to market. Had these railways been conducted as public highways ten years ago, the Standard Oil iniquity would have been impossible. But each of the four trunk lines was able to exclude competition from its tracks, and, by combining to destroy the competition of independent refiners, they were able to crush out a prosperous interest, and to build up in its place a gigantic and unscrupulous monopoly.

The proposed reform offers a complete remedy for all inequitable adjustments of rates between localities. It is not to be supposed that it would give the interior point the very same rates for transportation per

ton-mile as the great distributing-point; or that the farming regions of the Middle States could send their produce to market, at a charge as much lower than that on grain, from Nebraska or Dakota, as the distance is less. But the cost of transportation, from all places, would be fixed by the natural forces of competition, which would bring it into due relation to the cost of service. Even if this era of pools and fictitious business methods has shaken the public faith in these forces, every locality which is, or imagines that it is, unjustly treated in the rates of its freight traffic could, by the investment of a few thousands of dollars, establish a transportation line for its own freight, instead of having to lay out millions for a competing road. If Pittsburgh, Buffalo, or Indianapolis should have a real or imaginary grievance, in the lower rates given to Chicago or St. Louis, the former cities would have a remedy within their own grasp. A quarter of a million of dollars would give the merchants of these cities engines and cars to take their goods wherever they chose, over any railway that they might select, on payment of regular tolls. It is not likely that action of this kind would be often necessary. The power of competition to fix the just price for any service is practically universal, when it is perfectly free.

Besides the great results already pointed out, there are others to be expected from the proposed reform, which, while they may seem of minor importance, would yet be of real public value. Thus it would take away the power of railways to obstruct other means of communication, a power often exercised by one railway against another, and by a combination of railways against the water routes. One great trunk

line can shut off another from its connection with the metropolis, by holding a connecting link, or by the well-timed purchase of the shares of a subsidiary road which its rival needs. A central railway can exclude a lateral road, which has no other outlet, from all communication with the outer world, until the latter is forced to surrender its independent existence, upon such terms as the master corporation may dictate. A combination of railways may force an important water route into disuse, except for merely local traffic, as the trunk lines have done in the case of the Ohio river, by discriminating against it, and in favor of their railway allies, west of Pittsburgh and Wheeling. All these combinations and discriminations, designed to exclude competition, or to force subsidiary lines to subjection, violate the character of the public highway and the law as expressed in many decisions. But, like other illegal practices, they are maintained and the law is habitually nullified by the railways. Let the roads be opened to connecting roads on equal terms, and these practices will defeat themselves. If a great railway refuses equitable rates to a smaller one, the latter can run its own trains over the tracks of the former. If the Pennsylvania Railroad succeeds in preventing the Baltimore and Ohio from reaching New York with its own line, the Baltimore and Ohio can send its freight cars and engines over the Pennsylvania Railroad. Carriers from the Mississippi and Missouri rivers, by way of the Ohio, could command their own railway facilities, from Pittsburgh or Wheeling to New York, Philadelphia, or Baltimore. The foundation of monopoly in freight traffic being destroyed, the railway would lose both the motive and the power to punish

shippers for selecting a route for their freight beyond its line. The railway manager could no longer say to the shipper in his rates: "Unless your freight patronizes the connecting road, which it is my interest to favor, you must pay double or triple rates for the use of my line." The power to drive freights to particular routes by differential rates would be taken away. Commerce might seek the cheapest and best avenues for traffic, and freely use any highway established by the state. Besides, the railway interests, as a whole, would be sounder and stronger, if the smaller lines were made independent of the more powerful ones. It is not for the welfare of the railways, as a class, that the great fish shall always swallow the small ones. It may, indeed, in a narrow sense, be for the interests of those which swallow. But the sound and healthy growth of the whole railway system requires that all its members, small or great, should have equal chances for life. The character of railway investments will be improved, when new roads can be built without the sure prospect of yielding up their autonomy, and most of their profits, to some main line, before they can obtain the connections they need. It can be done when the right of every railroad company, or of every carrier, to transport freight over any line, at the same rate of toll, is established and enforced. Such a reform would prevent the greater roads from first freezing out, by discriminating rates, and then absorbing, all the branches and feeders dependent on them; and thus end a practice as hostile to the railway system as to the interests of the public at large.

In short, the reform proposed will afford a practical solution of every issue between the railways and the



people. Let it once be fully carried out, and all the detailed questions of rates, the discussion of which is necessary to an understanding of the present railway methods, will settle themselves. If there is any unsuspected virtue in the long hauls, which makes it as profitable for the railway to take cotton from Memphis to the seaboard at \$1 per bale as to take it from local points, half the distance, for \$3.50, free competition will prove it. If live-stock and dressed beef have some occult peculiarities, which make the latter cost seventy-five per cent. more to carry than an equal weight of the former, free competition will maintain the difference. But if these anomalies arise from imperfect competition, which brings competitive traffic near the cost of service, and extorts a compensation where there is no competition; or if they are founded on the power of the railways to adjust rates for the benefit of private investments by their managers, they will be removed and rates will be made equitable. Under free and open competition it is certain that there would be no such disproportion in the rates compared with the cost of service as now prevails. The rates for carrying freight a thousand miles would not be the same per mile as for a hundred; for the terminal charges are a constant element, as great in the one case as in the other. But it would be impossible, for instance, that the Central Pacific Railway should charge \$800 for a car of freight from New York to Virginia City, while accepting \$300 for carrying it from New York, through Virginia City, hundreds of miles farther to Sacramento. The greatest effect of the reform would be to bring rates into proper relation to the cost of service. The fixed element in that cost would then be the stated

toll per ton-mile necessary to maintain the railway in repair, and to yield a fair profit on the capital invested in it. Whatever differences of rates arise under the natural and legitimate conditions of transportation, would remain under free competition. Whatever differences are produced by the monopoly of the railways as carriers, which hinders or disturbs competition, or discriminates between particular interests, will be abolished. When transportation on the railways is as open as on canals or rivers, one locality can have no advantage over another, save as it is legitimately entitled to it by superior accessibility or natural facilities for business. The localities which enjoy the cheapest rates will be those from which the cost of transportation is least, or those which are able to furnish the largest traffic and attract the greatest competition. Thus, under the legitimate laws of trade, industries would seek the localities best adapted to them, and if any locality secured better advantages of transportation for its mines or its mills than another, it could only be as the result of the natural tendency of mercantile or industrial enterprises, to go where they will be most economically and advantageously prosecuted.

Let competition have its free course in every department of railway traffic, and it will fix the rates of transportation so as fairly to reward the service rendered, give to all branches of trade their just due in relative charges, and make the fluctuations in rates of freight as gradual and moderate as they are in lake or ocean transportation. The completeness and permanence of free competition is to be secured by the method proposed in this chapter. When the law maintains the right of every man to carry freight over the

railways, subject to proper tolls and necessary restrictions, the public interests which depend on free commerce will be fully protected. Let the work of railway corporations, in building and maintaining tracks, be kept distinct from the business of common carriers, in transporting freight over the roads, and let the latter be thrown open to all, and the abnormal developments of the modern railway power, the domination of the great corporations over trade, and the dangerous tendency of the corporate kings of commerce towards monopoly and favoritism will be radically destroyed.

While such a reform would invade privileges which the corporations claim, it would really infringe upon no interests which are legitimately vested in them. The railway owner regards all traffic on his road as the property of his corporation. A rival who competes for the traffic is stigmatized as "robbing the road of its business." While the business of carrying freight over a railway is thus held to be its property, the proposal to abolish its exclusive control of the business will, no doubt, be denounced as an attack upon its rights. But it does not attack or affect anything which railway capital and enterprise have created. It neither disturbs any tangible property belonging to the company, nor impairs its ability to earn a fair return on its invested capital. The easement of the railway corporation in its right of way, and its ownership of tracks, bridges, and tunnels are property rights, partly paid for and created by its own capital and labor; while its franchise of taking tolls is necessary to reward its enterprise. But it does not follow, because the railway corporation has received from the

sovereign power the right to construct and control a public highway, and has these legitimate proprietary interests, that it must be invested, in addition, with a monopoly of transportation over the highway. That monopoly which, under the most tolerant view, is a material impairment of the character of the public highway, is all that it is proposed to take from the railway. The right of the railway to a legitimate return on its investment is fully secured by maintaining its franchise to levy adequate tolls. No property right can be said to exist in a monopoly upon a public highway, when the right of the company which has constructed it to full return upon its invested capital can be perfectly secured without the monopoly.

But we may safely go further, and insist that the stability and legitimate prosperity of railway investments would be materially improved by establishing free competition. It is a law of trade that interests which depend upon monopoly for their foundation are subject to extreme fluctuations, and rapid alterations of prosperity and depression. In commerce, as in physics, the law of nature that is violated will work out its own revenge. The artificial establishment of high rates which check traffic, and the violent recourse to extremely low ones which give it an unnatural stimulation, are both due to the exclusive privileges of the railways, and would be alike removed by leaving rates to the regulation of free competition. Competition is the true regulator of the operations of commerce, as the governor is of the steam-engine. Railway earnings will be steady and secure, when they depend on uniform and fixed tolls, made sufficient to maintain the roads and to yield a fair return on their capital. To separate



the business of transportation, with its risks and fluctuations, from the business of building and owning railways, is to place the revenues of the latter upon a fixed and certain basis. It is not desirable that the tolls should be subject to great or rapid changes. They represent the fixed and permanent elements in the cost of transportation. The cost of keeping a railway in repair, the demand of bonded debt for interest, and that of capital for dividends, are constant, and should be met by steady and unchanging sources of revenue. This end would be largely attained by the reform now advocated. We have seen that free competition will lessen the fluctuations of charges for transportation; but besides, the separation of the carrying business from the functions of the railway company would wholly relieve the latter from the effects of such fluctuations, and give its prosperity the secure foundation of a uniform revenue from tolls. On such a basis the income of the railways would be as certain as the revenue of the government from tariffs and excise; and their securities, instead of being, as at present, subject to uncertainty and surrounded by the hazards of speculation, would attain much of the stability and popularity of government bonds.

The improvement in the position of legitimate railway interests would be further promoted, in that the power of railway managers to manipulate the stock market, or to use the railways in their private interests, would be greatly restricted. Let the business of the railways be limited to the collection of uniform tolls, and the wild fluctuations of the stock market, produced by the alternations of railway wars and railway combinations, with the prospect, now of bankruptcy, and now of enormous

dividends, would cease to build up enormous private fortunes for managers, while disturbing and disgracing the financial community. We should no longer see speculating managers destroy the earnings of a road, by diverting traffic, until they have bought up its shares, and then advance their price, by turning business back upon it, until they can sell the shares at a vast profit. Under this reform, directors could no longer fasten parasites upon their railways, in the shape of fast freight lines, to transfer all the profits of the freight from the pockets of the stockholders to their own. For these fast freight lines bear no resemblance to the common carriers who would use the railways under this reform. The right to use the roads would then be free to general competition. The freight lines which were so numerous eight years ago, and are still not unknown, were protected against competition by the railways; but the prosperity of carriers, under free competition, would depend solely on their efficiency and enterprise. The old system established parasites to suck the financial life-blood of each railway, for the benefit of a few powerful officials; the new one would raise up numerous patrons, all paying fair rates for the use of the railway, and each adding to its revenues. One system is an *imperium in imperio*, a monopoly within a monopoly; the other is free competition, upholding alike the independence of trade and the true prosperity of the railways. Railway officials would doubtless still be tempted secretly to reduce tolls to carriers in whose prosperity they might be personally interested. But the new system would make such a discrimination much more liable to disclosure and defeat. The only customers who have succeeded in forcing the railways

to respect their right to unrestrained and equal facilities are the express companies. Their capital has enabled them to carry on litigation against the railways on nearly equal terms; while the dependence of their prosperity on this right made it imperative on them to assert it persistently and in the highest courts. Similar organizations engaged in general freight traffic upon the railways, under a system of free competition, would defend their business against favors to a rival with equal success. Moreover, no serious discrimination could be made in tolls between different carriers, without becoming apparent in the decreased revenue of the railway. A comparison of the tonnage reports with the aggregate income of the railway from tolls would disclose any departure from uniform and avowed rates. Any such discrepancy would at once show that the shareholders had been robbed in their revenues, and that the shippers had been wronged by undue favors to a rival; and both classes would unite to correct and punish such abuses.

One effect of such a change would be to diminish the complexity of railway reports, and make them intelligible to all. The annual report of any great trunk line is now a sealed book to the average shareholder. He is confronted with tables of construction accounts, investment accounts, freight and passenger movements, gross earnings, revenues from leased lines, payments of rentals, loss or profit on branch lines, surplus, dividends, and sinking funds, and other details almost to infinity; his bewildered brain fails to comprehend how all this affects the value of his property; and he gratefully accepts the fact that the managers have allowed him a quarterly dividend of  $1\frac{1}{4}$  per cent. The removal

of the business of transportation from the charge of the railways would relieve these reports of two thirds of their complexity. Their expenditures would be confined to the construction account (practically closed at their completion), the repairs and betterments, and the payments for interest, dividends, and sinking funds; their revenue would be drawn from a fixed rate per ton-mile. All this could be put in a form plain to the humblest investor. He could know from the figures whether his property had been honestly and justly managed, or the reverse; and he could act intelligently in supporting the management, or voting to displace it. It is a strong incentive to such a reform that, while the railway manager may now be the master of the stockholders and the tyrant of commerce, he would then be relegated to his proper place, as the servant and employee of the owners of the road.

Again, such a reform would offer strong inducements for the free movement of local freight, and would vastly increase the volume of that traffic, both by the greater freedom of commerce, and by cheapening rates to the freight which bears the heaviest charges. Figures have already been referred to, showing the immense development of business from the reduction of charges during the last twenty years, mainly on through shipments and at special rates. Let local business enjoy the same stimulating effect of moderate charges, and its growth will show similar surprising results. The productive capacities of the regions which the railways traverse are never developed, until they offer the inducement of cheap rates. The development must need be imperfect, while their products must bear charges greater by 50 or even 150 per cent., in proportion to service, than



the products of Western lands. When all freight charges are brought, by universal competition, into equal relation with cost, the development of local traffic, in every district capable of development, will make previous records of expansion seem trivial. Such an increase will be the greatest good that can come to any railway. The development of its own section is the true aim of any enlightened railway policy, and the traffic which, under universal competition, would have no inducement to open competing routes, will bring the most permanent prosperity to the corporation.

Another benefit, which this reform promises to the railways, is that it will take away all incentives to unnecessary railway construction. The building of railways where they are not needed, or, more precisely, the construction of two rival tracks, where one would suffice for the business, is a double evil. It permanently sinks a large capital, which might be advantageously employed in other enterprises, and it impairs the capital, both of the new corporation and of the old one, by dividing between them the business which can fairly remunerate only one. There may be a few cases in which the business will fairly sustain two parallel railways; but, if so, the second line is not superfluous, and the case does not belong to the class now considered. The proposal, heretofore referred to, that new railway enterprises be restricted by law, recognizes an undoubted evil, but undertakes to apply to it an unjustifiable remedy. Enterprise must be left free to go where commerce and industry may call for it; and the capital it employs must take the risk of its possible mistakes. It is no duty of legislation to impose arbitrary checks on any class of enterprises, whether rail-

ways, rolling-mills, or wholesale stores; but it is its proper function to promote conditions under which their direction shall be natural. It cannot, consistently with the freedom of commerce, forbid railway construction anywhere; but it can and should remove unnatural conditions, which make it necessary to build new roads, in order to obtain the facilities which existing roads ought to afford; and which stimulate the building of unnecessary roads to share an artificial and temporary prosperity. To forbid the investment of new capital would be a legislative outrage; to remove the stimulus upon building unnecessary roads, and to establish conditions which will make the growth of new enterprises natural and legitimate, is the highest and wisest legislation. The difference is exactly that between regulating trade by legislative monopolies, and protecting it in the unhampered working of its own laws.

The conditions which now force the building of superfluous railways are mainly these: First, when communities or sections suffer under excessive or discriminating rates, imposed by the monopoly of a single railway or combination, a new road is their only relief; second, the artificial prosperity of existing railways, obtained by monopoly or by pooling combinations, often tempts capital to build an unnecessary new line, in the hope of sharing it. Superfluous railway construction is sometimes the last resort of commercial interests, suffering under the exactions of a railway monopoly, and sometimes the result of the desire of speculators with capital for a share in artificial railway prosperity. The two inducements have often acted together in producing new railways, parallel to old ones which are competent to carry all the business. Both alike result from the

monopoly which the corporations claim in transportation over their tracks. The first inducement is clearly illustrated by the example of the railways carrying freight from Pittsburgh to Lake Erie and the West. For forty miles three railways run side by side, through the Beaver and Mahoning valleys, and for fifteen miles of that distance a fourth weak and unimportant line is added. At no point in the forty miles are these tracks a mile apart. For nearly as great a distance, the three principal lines run to Pittsburgh, in a strip of country from five to fifteen miles in width, and for sixty miles farther, to the southeast, connecting railways, practically parallel, share the coal and coke traffic of southwestern Pennsylvania. Thus, for one hundred and forty miles, three railways run side by side, sharing the same traffic, offering virtually the same service, and in times of depression destroying each other's profits. The construction of two of these lines was the only escape from exactions of the monopoly of transportation in these regions twelve years ago. But they represent a vast waste of capital and labor. The traffic of these three single-track railways could be carried more expeditiously and economically by one double-tracked railway. Had a system of free competition, such as is proposed in this chapter, been in existence twelve years ago, commerce would have been free from the discriminations and exactions which compelled the building of the superfluous railways. The growth of traffic under competition would have enabled the first railway to build a double track, while its monopoly has forced into existence, at far greater expense, parallel lines to share its business and depreciate its value. All the interests concerned in the construction and

operation of these three parallel roads would have reaped far greater benefits, if, from the first, there had been but one road open to the free competition of carriers. The method of securing competition by building parallel lines, in comparison with that which legislation should provide for the public highways, involves, as in this case, a vast amount of wasted labor and capital. The objects might be much more effectually reached at a fraction of the cost.

Not less striking instances of parallel and unnecessary railways are the West Shore and "Nickel-Plate" enterprises. In these cases, local points on the Vanderbilt lines secured the benefit of competition by the new lines, while these maintained an independent existence; but the chief cause which attracted capital to their construction was the artificial prosperity of the trunk lines, produced by the temporary success of the pools. The extraordinary projects carried out, first by the Nickel-Plate road, and next by the West Shore, expose the necessary tendencies of the pooling policy. Each of these projects was an attempt to share the fictitious profits which the trunk-line pool had arbitrarily created. Both took advantage of the temporary stimulus it gave railway investments, to market vast amounts of fictitious securities; and while the projectors of one made a brilliant success in selling to the chief shareholders of the opposition, both companies became bankrupt and inflicted heavy losses upon investors. Together they represent a loss of more than two hundred millions of dollars, sunk in wholly unnecessary works. They are alike a loss to the country and a burden to the older companies which have bought off their competition at high prices. This is the "competi-



tion of capital," so highly extolled by Messrs. Atkinson and Lansing, as it really operates. Similar instances might be multiplied. All this is the result of the vicious claim of the railways to a monopoly in transportation. Their oppressive exactions, and the unhealthy prosperity temporarily created by their combinations, are punished by the outraged laws of trade, in the construction of rival lines, which divide the traffic, which sink capital in unnecessary tracks, and which destroy much of the value of the earlier roads. Such a condition of affairs calls for correction. The trade of all sections should be protected from excessive and unjust burdens; but the relief should not be sought in a wanton waste of property. Capital should be left free to embark in railways as in other enterprises; but the conditions produced by legislation should not offer a premium on the building of wholly superfluous railways. It is an injustice and wrong that labor and capital should be sunk in the construction of two or three railways, where all the service they render could be had from one under proper conditions. And the irony of the situation culminates in the obvious fact, that the interest which suffers the greatest loss, in the depreciation of its investments by the building of competing roads, might have secured vast advantages from free competition on the original lines.

The natural remedy for these evils is, to place the business of transportation over the railways on the same basis of free competition as that over canals and turnpikes. This measure will entirely remove one great cause of unnecessary railway construction. No one ever heard of the towns along the line of a canal projecting a parallel canal, to secure relief from exces-

sive charges. Free competition was established, so that a dozen canals, side by side, would have made it no more complete. It is only where there is a monopoly in transportation over a highway that communities are forced to seek relief from oppression and favoritism by sinking capital in rival routes. The relief afforded by opening transportation to all carriers, on equal terms, would be far more thorough and far less expensive. Fifty thousand dollars would enable any town, that does not think itself fairly treated, to place engines and cars for its own use on the railway, where millions would be required to construct a new road. Each community could be sure of sending its freight at will by any route, to any destination, upon equal terms with any other; while now, if it builds a new road, that road may still be absorbed by the greater corporations, and for transportation beyond its immediate termini it must depend on connecting lines. When it is within the power of such communities to obtain better transportation facilities by running new trains upon existing roads, the railways, too, will be benefited. Every such step adds to their traffic, increases their tolls, and justifies the further improvement of the highway; while the building of parallel lines divides their traffic, and permanently diminishes their value. For both the railways and the public, the remedy of free competition offers unqualified benefits, instead of the vast waste and loss incurred by the present practice of constructing parallel and unnecessary roads.

In another respect, the remedy would hardly be so complete or radical. Men would still be likely, in times of speculation, to rush into reckless schemes of railway expansion; and many would always be ready to

improve an opportunity for floating fictitious stocks, and for building roads under contracts with themselves at the expense of the bondholders. Giving the public the right to carry freight over the railways will not cure the cupidity and recklessness of financial adventurers; but it will take away the great prizes now offered for such anomalies as the two parallel routes already mentioned. It will do this in two ways: First, by establishing free competition, it will prevent the railways from using their monopoly of transportation to create an abnormal and transient condition of railroad prosperity, such as calls these parallel lines into existence; and second, when the activity of transportation makes the carrying business extremely profitable, it will attract new capital to share the profits, without creating new tracks, as a permanent burden to commerce and a lasting menace to the existing lines. When pooling is made impossible by the unlimited number of competitors in transportation, the factitious and fleeting prosperity caused by pooling, which called the West Shore and Nickel-Plate roads into being, will also be impossible.

The parallel routes that have been built under the existing conditions are facts which commerce must accept. But, like other abuses, springing from the reign of exclusive privileges on the railways, they furnish a warning and an indication of what is needed for the future. Together with the creation of monopolies over great interests, the crushing out of independent concerns by preferential rates, and the combination of the railway corporations, they point out the course which legislation must take for the future. What has been done may be regarded as a matter of the past; but if

the oppression of independent trade and the erection of monopolies, on the one hand, and the depreciation of legitimate railway interests by mad rivalry and reckless construction of parallel routes, on the other, are public evils, it is the duty of legislation to prevent their repetition in the future. That every one of these evils finds its support and cause in the exclusive control, by each railway, of the transportation over its tracks, has been clearly shown. That the complete and just remedy for these evils is to remove their cause, by throwing the right of transportation over the railways open to free competition, is the necessary conclusion.

It has been frequently urged by writers on the railway side of the question, that all inequalities and abuses should be left to the operation of the natural laws of commerce, and to the influence of free competition. This is exactly what is now proposed as the aim of legislation. The true function of legislation is to remove the restrictions upon free commerce, which have grown up under the claim of each railway to a monopoly of transportation over its own line, and to place transportation upon the broad and natural basis of competition, by making the right to transport freight over the railways as universal as it is over canals, turnpikes, and navigable rivers. This is wholly within the power of government. The restrictions upon competition, imposed by the exclusive privileges of the railways, are due to the laws, or the perversions of law, by which those privileges have been seized. Legislation must turn from the support of exclusive rights and partial monopolies, and must protect the independence of trade and the freedom of every man to engage in transportation



on the public highways. Such a policy will promote the widest freedom and most unrestricted operation of trade and industry, and the most natural and stable prosperity of the railways.

The way to legislation of this sort is made easy by the fact that, if adopted in one state, or made applicable only to inter-state commerce, it will not hamper the railways subject to it in competition with others. The objection to restrictive regulation, by commissions or by such provisions as those of the Reagan bill, that, unless adopted by all legislatures, its effects will be uneven and inequitable, has been sufficiently considered in the preceding chapter; and it is only necessary to say here that it has no force against this proposal. The railway thrown open to general competition, by establishing the public right to engage in transportation over its track, will not be placed at a disadvantage as compared with its rival in another state. It will rather have a decided advantage in competition. It will have a steady and reliable revenue, from uniform tolls upon its entire traffic. It will expand its local traffic, by removing the inequalities which have dwarfed and checked it. It will attract through traffic, by inviting carriers from every section. Give the Western carriers the right to run their trains to New York over one of the trunk lines, and to bring them back, taking freight on their own terms, and they will invariably choose that route, in preference to one where their cars must pass beyond their control and, perhaps, not be returned for many months, where their rates must be subject to the decisions of a dozen different railway powers, and where the safety or promptness of the service, which they contract to perform, is at the mercy

of half a dozen transportation agencies wholly beyond their control or knowledge. It seems almost self-evident that if any one of the trunk lines should offer carriers such great attractions as the free use of its track upon the payment of a reasonable toll, the rival lines would be forced to adopt the same course, in order to maintain their through traffic. The only interests that would be hampered would be those of monopolies that have been created by the unjust exercise of the railway power, and those of officials who now enrich themselves by discriminations in rates and by manipulating the price of stocks.

The measures necessary to establish the public rights in the railways are next to be considered. It may very plausibly be argued that, upon the principles defined by the courts as fundamental, in the early days of the railway system, no legislation whatever is needed. Under the rulings of Justice Baldwin and Chancellor Walworth, the use of the railways as public highways is the right of every citizen. If these decisions are law, any one may bring his trains to a railway and demand passage. This is a plain deduction from the decision of the Supreme Court of the United States in the Camden and Amboy case. The corporation must furnish a public highway, in fact as well as in name. The legislature could not have delegated the power of eminent domain to the railway on any other conditions, if we accept the authority of Justice Baldwin in this case. "The declaration in the charter that it (the railway) is for public use does not make it so, *if the effect of the charter is to give the exclusive use to the corporation*," says the syllabus; and we are told, in the body of the decision, that to take land for private or exclusive use, by right of

eminent domain, "is opposed to every constitutional principle which protects the right of property." What constitutes this right of public use is no less clearly set forth. It exists "if the public have the right of passage thereon, by paying a reasonable, stipulated, and uniform *toll*" (not passenger fares or freight charges); and, again, "the true criterion is . . . whether the public can participate in them by right or only by permission." Under this principle, laid down in a decision in favor of the railway, there is no doubt of the right of the public to use the railway tracks, on equal terms and conditions with the railway companies themselves. There is certainly no doubt as to such right in the case of the several important roads operated under the older charters, in which the grant of power to build and work the railway, and to take toll, is not accompanied by an exclusive privilege of transportation. When we come to the cases where the legislatures have made a direct grant of that exclusive privilege, it still remains a fact that the early rulings referred to decisively deny the constitutionality of such grants. They rest upon the principle that, if the legislature should attempt to endow the railway corporations with any privileges inconsistent with the preservation of the road as a public highway, it would exceed its power, and could not be permitted to so use the sovereign right of eminent domain, in a way, as Chancellor Walworth said, "repugnant to the constitution of the United States." The unanimous decision of the courts was that the legislature had not so used its power; but that it had provided for the establishment of public highways, which should be open to the use of the public. With regard to the charters then under consideration, the decision

was right; for they required that the use of the tracks for transportation should be open to all carriers, on what was then "a stipulated, reasonable, and uniform toll." The Camden and Amboy decision unmistakably asserted that the legislature cannot, directly or indirectly, grant any monopoly over its highways. The mere suspicion that the right of charging a high toll might give the corporation such a monopoly, was held to cast a doubt on the validity of the charter, and it was only passed over because the doubt was not strong enough, in the particular case, to warrant the declaration that the charter was unconstitutional. But if the Supreme Court then regarded the right of taking a high toll as containing "strong features of a monopoly," with what crushing promptness would it have overruled the direct grant of exclusive privileges in transportation over the public highway, as beyond the power of any legislature, and wholly "opposed to every constitutional principle which protects the right of private property."

If these principles, defined by the most eminent courts at the beginning of the railway era, and by virtue of which the railways gained their existence, are final, no legislation is needed to establish the public right of transportation over the railways. Under them, all that any man has to do, when he wishes to transport freight over a railway, is to demand that right. If it is denied, he can assert it in the courts. In opposing his action, the railways would be confronted by one of two unpleasant alternatives. Either their charters must reserve this public right, which has been long denied in railway practice, or it must be claimed that they contain such a grant of monopoly as exceeds legislative power, and vitiates their constitutionality. Under



the law, as laid down by the courts of half a century ago, the railways must either concede the public right of transportation over their tracks, or must forfeit their corporate existence. Under this view, all that is needed for the establishment of free competition is the assertion of the public right and its protection by the courts; and the railways would promptly choose between surrendering their usurped monopoly of transportation, and subjecting themselves to the risk of having their charters declared unconstitutional and null. It is possible that legislation might assist in the assertion of this right, by declaratory measures, or by bringing the law officers of the state to its support. But the essential fact is that, if the common-law principles applied to railway charters by the most eminent judges of two generations ago, and which furnish the very foundation of the railway system, are still valid, the legal right of every man to the free use of the public highway exists to-day, just as fully in the case of the railways as in that of the turnpikes or the canals, and only requires a bold and vigorous assertion to establish its reformatory and restraining influence throughout the railway system.

Will the courts uphold the principle in question? It must be acknowledged that its strength has been impaired by later judicial utterances. The Supreme Court of the United States in 1874 differed from the Supreme Court of the United States in 1842, on the question whether the grant to a railway corporation of a monopoly in transportation over its own track is consistent with the character of a public highway. The later ruling, as clearly as earlier ones, requires that the railway shall be a public highway, and denies that a

legislature can exercise the right of eminent domain in behalf of a railway, unless it is to be a public highway. But when the question arises, Is it essential to the nature of a public highway that it be open for transportation to all persons? Justice Strong says: "It bears only upon the mode of use, of which the legislature is the exclusive judge." Almost the same phraseology was employed in the Circuit Court of the United States by Judge Emmons, who said: "We are utterly unable to see anything more than a mere mode of use, of which the law-making power is beyond doubt the sole judge." But if the legislature is the exclusive judge of the necessity of this mode of use, the whole subject appears to be open to reform by legislative enactment. The legislature being the sole judge, it may regulate the mode of use of the public highway, with a view to the public interests as well as the permanent prosperity of the roads. Experience having shown that the mode of use of these highways, practised by the companies, and sanctioned in later years by legislation, leads to pooling combinations which defy the law, to discriminating and preferential rates which outrage justice, and to reckless and wasteful warfare between parallel lines, it is the duty of the legislature to re-establish the "mode of use" which opens the roads to all carriers and renders such abuses impossible.

It will doubtless be claimed that the exclusive privilege of transportation over its road is a vested right of the railway corporation, which the legislatures cannot amend or take away. But can a corporation obtain a vested right in a "method of use" of a public highway, and especially in a monopoly of its use? It is settled that the power of the legislature to regulate

the railways is general, unless limited by express contract with the state. Such a contract, according to the later decisions, must be direct and unmistakable. Nothing is to be implied against the state. The grant to a corporation of the exclusive privilege of running cars over its tracks only amounts to permitting that mode of use, and constitutes no contract that the legislature will never authorize another mode of use, which may prove better for the public and for the railway itself. Nothing short of a specific agreement in the charter, that no future legislature shall alter the mode of use of the railway, would thus bind the state; and even if such an agreement were inserted in a charter, it would still be a grave question whether a legislature can bind its successors not to exercise a constitutional power. In cases involving the regulation of rates, the courts have frequently denied that the legislature can do so. The exclusive privilege of transportation granted by a charter stands on no better legal basis than the right to charge certain tolls or freight rates granted by the same charter. Yet, in many cases, the power of subsequent legislatures to change and reduce the charges has been affirmed. It is wholly "a method of use" subject to legislative regulation. To change it, so as to secure free competition, without impairing the franchise of the corporation, or destroying its power to obtain fair remuneration for its service, can infringe on no vested right, nor violate any legislative contract. The reasoning which sustains the legislative power to regulate rates and to prohibit discriminations, applies with equal force to the power to regulate the mode of using the railways, and of which, in the words of the Supreme Court of the United States, "the legislature is the exclusive judge."

But it is unnecessary to press this argument, for the final success of the reform does not depend upon the power of the legislature to regulate the method of use which the existing railway corporations may practise. Even if we assume that what the courts now declare to be a "mode of use," and what the earlier courts declared to be an unconstitutional monopoly, is a vested right which the legislature cannot touch, yet the establishment of the public right to use the railways is still within the powers of the legislature. Concede to the railway corporations every legal claim they make, and the power which created them still remains supreme. The sovereignty which has taken the property of private citizens, to establish highways for the public benefit, can in turn take away the franchises and easements in those highways, to establish other highways for the public benefit. This principle is established beyond dispute by many decisions, and is admitted in the textbooks of railway law.

*The power of eminent domain may be used to appropriate the rights of way and franchises of one public highway, for the establishment of another, better suited to the public interest.*

This exercise of sovereignty has been essential to the building up of the railway system, and has hitherto been upheld for the benefit of the railway companies. Again and again, rights of way and franchises, already granted to corporations by charters from the state, have been condemned and appropriated for the building of railways. The exercise of this power, for the establishment of highways more useful to the public than those taken, was undoubtedly just and equitable. The interest of corporations, in any public highway which



they control, is not more sacred and inviolable than was the right of private property, in the land originally taken for their benefit. All are subject to the sovereign power of the state, when needed for public use. Railway property is no more sacred than either private property, or the easements of canals and plank roads; and as the railways have taken, by the power of eminent domain, both private property and the rights of way of other highways, their property and franchises can in turn be taken, to establish free and more useful highways for commerce.

This principle is established by many authorities, to a few of which we refer. It is fully set forth in Chief-justice Redfield's book on "The Law of Railways."\*

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\* See Redfield on Railways, chap. xi. sec. 8, page 255. "The franchise of a turnpike or bridge or other similar corporation may be taken for a free road or for a railway, which, as we have said, is a public highway." Having remarked that this can be done where the franchise is situated partly within the limits of different states, but that one state can only take what lies within its limits, and that compensation must be provided for in exercising the power of eminent domain, Redfield adds: "So also may the franchise of one railway be taken for the construction of another railway." In a recent case the law was thus stated by Shaw, *C. J.*: "The courts are of the opinion that it is competent for the legislature, under the right of eminent domain, to grant authority to a railway to take a highway longitudinally in the construction of their road. The power of eminent domain is a prerogative of sovereignty, founded upon public exigency, according to the maxim, *salus reipublicæ lex suprema est*, to which all minor considerations must yield, and which can only be limited by such exigency. The grant of land for one public use must yield to another more urgent."

As to the inviolability of corporate franchises and the obligation of contracts, this author remarks that, "where exclusive privileges are conferred upon private corporations by express words or necessary implication, the grant is irrevocable and inviolable. But the grant of any privilege or franchise carries no implied exclusion of similar franchises and privileges being conferred upon other persons, natural or corporate." Again, in the tenth paragraph of this chapter he says: "But the exclu-

This standard work on the legal principles which underlie the existence of the railways shows this principle to be so firmly established that, to use the words

sive character of a corporate grant will not preclude the power to take a franchise upon making compensation, under the right of eminent domain; the stipulation in the charter, that the grant shall be exclusive of all others, being subject to the same law as other property whether in possession or action; all of which is confessedly subject to the exercise of eminent domain by the sovereign.

"It has sometimes been characterized as a refinement or invasion to identify the covenant in the charter of a private corporation, that the grant shall be exclusive of all others, with the charter itself, and thus subject it to the law of eminent domain. But it seems to us an entirely sound view, in all cases where the whole franchise of the corporation is proposed to be taken, and that the charge of refinement is rather to be laid at the door of such as attempt to raise a distinction between the exclusiveness of the grant and the grant itself, in order to preserve the inviolability of the former, which is the lesser and subordinate franchise, when the latter and paramount franchise of a corporation is confessedly subject to the law of eminent domain." For these principles the author refers to *Enfield Toll Bridge Co. vs. Hartford and New Haven Railway*, 17 Conn. 40 and 454, and says: "This doctrine has been so repeatedly asserted by all the courts of the country that it seems scarcely requisite to multiply references. And the right to take the franchise of another corporation, by parity of reason, carries the right to impair another franchise to any extent upon making indemnity. *Matter of Kerr*, 24 Bart. 119." Judge Redfield also cites the case of the *West River Bridge Co. vs. Dix*, to which we shall refer more fully hereafter, approving the view of Justice Woodbury: "It is difficult to comprehend why the *exclusiveness* of the grant to a private corporation should, upon principle, be any more inviolable by legislative authority than any other part of the corporate franchise. It is only as property that it is valuable, or that it is protected at all. And property is, in cases of proper necessity, subject to the law of eminent domain." But of Judge Woodbury's suggestion in this case that, if the charter contained an express stipulation against the exercise of the right of eminent domain against the corporation, it might be binding, Redfield says, "This is certainly not the prevailing opinion." Adding:

"In regard to the right of eminent domain, it seems now to be conceded that no legislature, upon any consideration or pretence whatever, can deprive a future legislature of its exercise in the absolute annihilation of corporate franchise upon just and adequate compensation. In

of the author, "it seems scarcely requisite to multiply references." Not only does Redfield assert the power of the legislature to subject the property of railway corporations, as well as other public highways, to the right of eminent domain, but he maintains that it is impossible for a legislative contract to be made by which the exercise of that right in the future can be prevented. After referring to the one decision which intimates the possibility of binding the state by such a stipulation, he says that "this is certainly not the prevailing opinion," but "that no legislature, upon any consideration or pretence whatever, can deprive a future legislature of its exercise (that of the right of eminent domain) in the absolute annihilation of corporate franchises upon just and adequate compensation." Among the leading cases on this principle is one\* in which the

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*Backus vs. Lebanon* (11 N. H. 19), *Parker, C. J.*, says: "Had the charter contained an express stipulation that the property of the corporation should never be taken in the exercise of the power of eminent domain, the question would at once have arisen, whether it was competent for any legislature to make a contract of that character; whether any legislature has authority by contract to lay restrictions upon this power." (Reference is here made to *Piscataqua Bridge vs. New Hampshire Bridge*, 7 N. H. 35, 69. See also *Brewster vs. Hough*, 10 N. H. 138; *Northern Railway vs. Concord and Claremont Railway*, 7 Foster, 183.)

Greenleaf says of powers of government of this class: "They are intrusted to the legislature to be exercised, not to be bartered away; and it is indispensable that each legislature should assemble with the same measure of sovereign power which was held by its predecessors. Any act of the legislature disabling itself from the future exercise of powers intrusted to it for the public good must be void, being in effect a covenant to desert its paramount duty to the whole people. It is therefore deemed not competent for a legislature to covenant that it will not, under any circumstances, open another avenue for the public travel, within certain limits or a certain term of time; such covenant being an alienation of sovereign power and a violation of public duty." *Greenleaf on Cruse*, vol. ii., note to pp. 67, 68.

\* *West River Bridge Co. vs. Dix* (6 Howard, 507, U.S., 1848). The syllabus says:

appropriation of a toll-bridge, chartered by the Vermont legislature for a hundred years, was declared by the Supreme Court of the United States to be subject

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"A bridge held by an incorporated company under a charter from a state may be condemned and taken as a part of a public highway under the laws of that state.

"This charter was a contract between the state and the company, but, like all private rights, it is subject to the right of eminent domain in the state.

"The constitution of the United States cannot be so construed as to take away this right from the states.

"Nor does the exercise of the right of eminent domain interfere with the inviolability of contracts. All property is held by tenure from the state, and all contracts are made subject to the right of eminent domain. The contract is therefore not violated by the exercise of the right.

"Property held by an incorporated company stands upon the same footing with that held by an individual, and a franchise cannot be distinguished from other property."

In 1795 the legislature of Vermont granted to the plaintiffs in error the right to erect a bridge over the West River, which was by the act made exclusive for a term of one hundred years. In 1839 the legislature passed an act authorizing the courts to take, for the use of new highways, any real estate, easement, or franchise of a turnpike or other corporation, and in 1843 the courts of Vermont ordered, upon petition, the taking of this bridge for the highway.

The decree was sustained by the Supreme Court of Vermont and, on appeal, by the Supreme Court of the United States. The exhaustive opinions of Justices Daniels, McLean, and Woodbury affirmed the points given in the syllabus. Justice Woodbury says: "I exclude, therefore, all conclusions as to my opinions here being otherwise than is in conformity to these suggestions, though where, as in the present case, a free public use in a highway and bridge is substituted for a toll-bridge, and on a long or great and increasing line of public travel, and thus vests a new benefit and use and a more enlarged one, in the public, and not in any few stockholders, I have no doubt that these entitle that public, for such a use, to condemn private property. (*Boston Water-Power Company vs. Boston and Worcester Railroad*, 23 Pick. 360.) And it is manifest that, unless such a course can be pursued, the means of social and commercial intercourse might be petrified and remain for ages, like the fossil remains in sandstone, unaltered; and the government, the organ of a progressive community, be paralyzed in every important public improvement."

The case of the *Central Bridge Company vs. Lowell* (4 Gray, 474, 1855),



to the right of eminent domain. The charter was recognized as a contract with the state; "but like all private rights," says the syllabus, "it is subject to the right of eminent domain," and "the constitution of the United States cannot be so construed as to take away this right from the state." The claim that such a charter is protected by the inviolability of contracts was considered. "All contracts are made subject to the right of eminent domain." And finally, Justice Woodbury's opinion seems almost prophetic, as preparing the way for the reform now needed in the railway system. He asserts that the obtaining of "a new benefit

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in which exclusive privileges for a bridge, granted for seventy years, were taken by the City of Lowell for a street, is similar in principle to that of the West River Bridge Company *vs.* Dix. We cite it for the sake of Justice Bigelow's impressive words: "Nor is the principle thus recognized any violation of justice or sound policy, nor does it in any degree tend to impair the obligation or infringe upon the sanctity of contracts. It rests on the basis that the public convenience and necessity are of paramount importance and obligation, to which, when duly ascertained and declared by the sovereign authority, all minor considerations and private rights and interests must be held, in a certain measure and to a certain extent, subordinate. By the grant of a franchise to individuals for one purpose, the legislature do not forever debar themselves from giving to others new and paramount privileges, when required by public exigencies, although it may be necessary, in the exercise of such rights and privileges, to take and appropriate a franchise previously granted. If such were the rule, great public improvements, rendered necessary by the increasing wants of society, in the development of civilization and the progress of the arts, might be prevented by legislative grants which were wise and expedient in their time, but which the public necessities have outgrown and rendered obsolete. The only true rule of policy, as well as of law, is that a grant for one public purpose must yield to another more urgent and important; and this can be effected without any infringement on the constitutional rights of the subject. If in such cases suitable and adequate provision is made by the legislature for the compensation of those whose property or franchise is injured or taken away, there is no violation of faith or private right. The obligation of the contract created by the original charter is thereby recognized.

and use, and a more enlarged one, in the public and not in any few stockholders," is a proper function of the state, and that without that power "the means of social and commercial intercourse might be petrified and remain for ages like the fossil remains in sandstone, unaltered, and the government, the organ of a progressive community, be paralyzed in every important public improvement."

In other cases the same principle has been affirmed, both for the benefit of railways and in restriction of their privileges. In Indiana the Supreme Court held that one railway could appropriate the right of way of another, notwithstanding a provision in the earlier charter which, more directly than in any other case, seemed to bind the state not to interfere with the rights or privileges of the older corporation.\* In a Vermont case, the appropriation by a railway of a con-

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\* In the case of the New Castle and Richmond Railroad Company vs. the Peru and Indianapolis Railroad Company (3 Ind. 464, 1852), it was held that the former road had the right to appropriate the track of the latter, subject to its right of way. The grant by the charter of a right by which it became seized in fee simple of the land it obtains, does not release the fee from subjection to the power of the state, but "vests it subject to the right of the state to take the same on compensation being made for the public use."

A clause in the charter provided that "no person, body politic or corporate, shall in any way interfere with, molest, disturb, or injure any of the rights or privileges thereby granted, or that would be calculated to detract from or affect the profits of said corporation." It was held that the state did not thereby relinquish the right to charter any other company which would compete with said Peru and Indianapolis Railroad Company, nor the right to take such land for public use. In this case the court said: "It is not necessary that we should here decide whether the state can deprive herself, by contract, with a citizen, of any part of her sovereignty, her right of eminent domain. It is sufficient for this case to say that she will not be taken to have done it without a very clear expression to that effect."

siderable portion of the right of way of a turnpike was unequivocally affirmed by the Supreme Court of the state. "It now appears to be too well settled to be controverted," said that court, in 1849, "that there is no implied contract, in the charter of a turnpike or other private corporation, that their property, or even their franchise itself, shall be exempt from the common liability of the property of individuals to be taken for the public use;" and that the property of a turnpike may be taken for a railway as well as the property of private individuals for a turnpike.\* In Massachu-

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\* See *White River Turnpike Company vs. Vermont Central R. R. Company* (21 Vt. 590, 1849). This case involved the right of the railway to appropriate the right of way of the turnpike company, not only for crossings, but for a considerable distance. On the right of the legislature to grant this power the court said: "Upon this question it is deemed sufficient to say that it now appears to be too well settled to be controverted that there is no implied contract by the state in a charter of a turnpike, or other private corporation, that their property, or even their franchise itself, shall be exempt from the common liability of the property of individuals to be taken for the public use; that it may be taken on proper compensation being made; that a railroad is an improved highway, and that property taken for its use, by authority of the legislature, is property taken for the public use, as much as if taken for any other highway, and that the legislature may delegate its powers to a railroad corporation to take private property for public use in the construction of the railroad, as well as to a turnpike corporation to take the like property for the public use in the construction of a turnpike road." (*Armington vs. Bennett*, 15 Vt. 745; *Enfield Toll-Bridge Company vs. Hartford and New Haven Railroad*, 17 Conn. 454; and the *West River and Water-Power* cases, elsewhere quoted from, are cited by the court.

The *Enfield Bridge* case (in 1846) was an affirmation of the right of the railway to condemn the exclusive franchise of the bridge. The syllabus says, "The franchise of the *Enfield Toll Bridge*, aside from any special legislation in regard to it, is subject to the same legislative control for public use as any other species of property," and, "that a franchise issuing out of land was an incorporeal hereditament, which might be treated as real estate in the charter, and an injury done to it would be subject of assessment."

setts\* the same doctrine was affirmed in 1839. Finally, it was distinctly declared, in 1851, by the Supreme Court of the United States.† These are early cases, since of late the power of the legislature to appropriate other highways for the use of railways has been undisputed.

The principle so long applied to build up the railway system is equally applicable to its reformation. If the exclusive right of transportation over their tracks is vested in the railway companies, the legislatures may

\* *Boston Water-Power Company vs. Boston and Worcester Railroad* (23 Pick. 360). Full control over the waters of an arm of the sea was granted to plaintiffs, for the purpose of furnishing water-power. The building of a railroad across the basin, injuring the property, was held to be within the power of the legislature upon compensation for injury. Shaw, Chief-justice, also held that the grant to the water-power corporation "did not withdraw it from a liability which all lands in the commonwealth are subject to, to be taken for public use, for an equivalent, when, in the opinion of the legislature, the public exigency requires it; and that the effect of the railroad act was merely to appropriate to another and distinct public use a portion of the land over which the franchise of the water-power company was to be used. If the whole of the franchise should become necessary, it seems that the right of eminent domain would authorize the legislature to take it on payment of a full equivalent. Such exercise of right of eminent domain does not impair the obligation of contracts."

† *Richmond, &c., Railway vs. Louisa Railway* (13 Howard, 71). The opinion of the court, by Justice Grier, affirmed the right of the legislature to authorize the latter road, notwithstanding an agreement to the contrary in the charter of the former. The court said: "The counsel, very properly, have not insisted, in their argument in this court, on this point made in their bill, that the legislature had no power to authorize the construction of one railroad across another. The grant of a franchise is of no higher order, and confers no more sacred title, than a grant of land to an individual; and, when the public necessities require it, the one as well as the other may be taken for public purposes; nor does such an exercise of the right of eminent domain interfere with the inviolability of contracts." The principle was not denied in Justice Curtis's dissenting opinion; but he claimed that it did not apply to this case.



still charter corporations which will give the public "a new benefit and use and a more enlarged one," to quote Justice Woodbury's language, by opening the railways to all carriers, with their own engines and cars; and may appropriate, for such improved and free railways, the rights of way and franchises of the existing roads. In Justice Grier's words, "the grant of the franchises of the railways is of no higher order, and confers no more sacred title, than the grant of land to an individual." The power that appropriated private property, and gave it to the railway for the public benefit, can, when it is made apparent that the public benefit will be subserved thereby, take it from the present railway corporation and give it to another; stipulating for its free use by the public. For such a reform as this, "the only true rule of policy as well as of law," in Chief-justice Shaw's words, "is that a grant for one public purpose must yield to another more urgent and important; and this can be effected without any infringement on the constitutional rights of the subject." In all this, as declared by the Supreme Court of the United States, and the courts of Massachusetts and Vermont, there is no violation of contract. It is taking private property for public use, just as the right of way was taken for the railways, but for public use in a higher and more perfect form. It is appropriating a *quasi* public highway, on which transportation is a monopoly, for the creation of a true public highway, with its essential features—equal rights and free competition. Such a reform, with the consequent suppression of the methods by which monopoly in the railways now oppresses trade, is the greatest attainable improvement in the modern system of public highways,

and one of the worthiest objects for which the legislative power of eminent domain could be exerted.

The means by which legislation may establish free competition in railway transportation are thus made clear. With regard to roads whose charters grant no exclusive privilege of transportation, and but simply authorize them to take tolls, all that is needed is a legislative declaration of the rights of the public, the enactment of regulations to secure safety and convenience in running trains, and possibly instructions to the legal officers of the state to enforce the public rights through the courts. Similar laws might be passed even for the railways whose charters make them the sole carriers on their tracks. It would be worth while to test the question whether, under our constitutional government, any legislature can grant a monopoly in a public highway established by seizing private property. It would be salutary to make this question a political issue, and so to direct the public mind to the principles on which public rights and the freedom of trade rest. But, however such an effort might result, the legislature has in reserve a power which is ample to secure the end in view. Let a general act grant the right of eminent domain to corporations, whose charters shall open their lines on equal terms to every carrier, and authorize the appropriation by them of the rights of way and franchises of any railway which monopolizes its track, and the problem will be solved. Upon the enactment of such a law, existing railways would make haste to divest themselves of the monopoly they now claim, and to proffer to the entire public unobstructed privileges of transportation.

Of course, such a law must provide methods for de-

termining the proper value of the property and franchises to be taken under it. Full compensation, on the basis of real value, is an essential incident to the exercise of the power of eminent domain. No inflated bonds or fictitious stocks could be imposed on the corporation taking the property, for the owner is entitled to compensation for actual value only; but, on the other hand, the corporation whose property is taken must have a real equivalent, determined by legal process, for its rights and franchises. Legislation would also be necessary to settle many incidental questions relating to the use of the roads. It must determine whether regulations for safety and promptness in moving trains should be established by each corporation over its own track, or by general law. It must determine whether carriers desiring to run trains shall give bonds for the safety of their rolling-stock, and for the conduct of their employees, or whether they should merely be liable for damages resulting from neglect or disobedience. The question whether a discrimination between carriers, on the part of a railway corporation, either in tolls or in facilities, should be punished by forfeiture of the charter or by other penalties, should also be answered by this legislation.

Another question of great importance is, whether a railway corporation shall be permitted to compete as a carrier, or whether it shall, by law, be confined strictly to the function of building and maintaining a railway for the use of the public. We have hitherto assumed that the company might be permitted to run its own trains. But there are serious objections to this, and it may be necessary to separate the functions of the railways wholly from those of the carrier. The grav-

est abuses of the railway system have arisen when the railways, or their officers, engage in business dependent on them for transportation. It is then only a question of time, unless the moderation of the railways is superhuman, how long they will permit the existence of rivals who are wholly at their mercy. One consideration or another may prevent a railway from entirely crushing out the shippers who compete with it in its subsidiary business; but the existence of the power to do so, and the fact that it has often been exercised to the full extent, are reasons enough for demanding that the boundary be definitely and clearly drawn between the function of the railway and that of the transporter, and that the law limit the railway corporation strictly to its own work. It may still be doubted whether that work should be only to build and maintain the railway, or should include the furnishing of motive power for all carriers. The latter view will seem to many to indicate the proper division of duties between the railways and the carriers. It finds much support in the early history of railroads, in the experience of the public works of Pennsylvania.

The canals and railways built by that state, and operated by it for nearly twenty years, are well known as an illustration of the evils of political management in business enterprises. They are salient examples of the demoralizing effect which politics and public works can exert on each other; and the constant strife for their patronage, its use for political rewards, and the expensive administration and unsatisfactory revenues of the roads finally led the state to part with them. But they have another lesson for us, as an instance in which, for many years, the business of transporting freight



over an improved public highway, including canals and railways, was open to general competition, while the state corporation owning it confined itself to the functions of building and maintaining the roads, and furnishing the motive power on the railways. These railways were the Allegheny Portage and the Philadelphia and Columbia. The former connected two sections of the state canal on each side of the Allegheny mountains, while the latter connected the eastern end of the canal with Philadelphia. Over the canal, of course, every one was free to run canal boats; while over the railways carriers could send their freight, either in sections of the canal boats, mounted on wheels, or in ordinary freight cars, to be hauled by motive power furnished by the state, at fixed charges per ton per mile.

As compared with present methods of railway transportation, those employed on this route were rudimentary. In its earlier operations, before the locomotive was perfected, the motive power was furnished by horses; while for nearly a generation the inclined planes of the Portage road were worked by stationary engines. But these early methods of railroading did the work of one of the great trans-Allegheny thoroughfares, and demonstrated the practicability of a railway which permits carriers to run their own cars, while it furnishes the motive power. The ability of transporters and carriers at large to compete on this route caused no confusion and no practical difficulty. All shippers and carriers enjoyed impartially the same rates and privileges. In adequacy and economy of service, this route compared favorably with others in that era of railway development; and, although, in the latter part of its history, a competing railroad took away the passenger

traffic of the canal, by connecting with the Philadelphia and Columbia Railroad at Lancaster, the freight business still sought the route which granted this modified freedom of transportation. While the political influences which surrounded this system of transportation insured its destruction, the privilege of free transportation by competing carriers was of undoubted value. When the Pennsylvania Railroad finally obtained control of the state roads, and imposed charges for hauling the cars of other carriers which were practically prohibitory, thus establishing a monopoly in transportation, there was a general protest from the shipping interests.

The history of the Pennsylvania public works, and the common practice of the railways in transporting the cars of other railway companies, prove that a system in which the business of the railways shall be confined to hauling the cars of common carriers, or shippers, at uniform and fixed charges, is entirely practicable. But I am hardly prepared to admit that this would be the most natural division of the functions of railway companies from those of common carriers, or the simplest and most effective practical reform. The natural division is between the duties of transportation, which can be thrown open to competition on the one hand, and those of constructing and maintaining the railway on the other. There is hardly more reason for excluding the general public from the right to own and run locomotives, under proper restrictions, than for excluding them from owning and running cars; and in this work, also, the regulative influence of competition would be the best safeguard against encroachments by the railway company. In the case just referred to, the exclusive right of furnishing the motive power enabled

the railway company to usurp the exclusive right of transportation. Had both functions, that of transporting freight in cars and that of hauling them after they were loaded, been free to general competition, the evils of favoritism and monopoly now rife in the railway system of Pennsylvania would have been impossible. Nor is it at all clear that if the tolls charged to carriers at large were limited to what is necessary for maintenance and for interest on the investment, there would be any necessity for excluding the railway companies from the general business of transportation. The Pennsylvania Railroad was able to exclude all other cars but its own from its track, by prohibitory charges for hauling them. Other railways have been able to drive out competition in the coal industry, by the same ability to show favoritism in charges or services. But if their charges to the competing carriers were fixed, on the distinct and permanent basis of the rate per ton-mile required to pay dividends, the exclusion of competition by prohibitory charges would be guarded against with tolerable security. The railways and railway officials interested in mines or manufactures are enabled to destroy competition only by their monopoly in transportation. Let the right of every one to transport freight on equal terms with them be enforced, and competition will be free and fair. There may be practical reasons in favor of a system, in which the railway could furnish the motive power and nothing more, or of one in which carriers might make up and haul their own trains; but the final determination of this question may be left to discussion and experience, provided that the principle of free competition is secured. There are other details of the reform, which must be left for further considera-

tion. Some of them will be of great practical importance, but they are secondary to the essential principle of the reform. Let them be settled in whatever way the legislatures may determine, so that this great principle is established and made effective, that transportation over the railways is open to any man who will conform to the necessary regulations, and pay "stipulated, uniform, and reasonable tolls." Place the public right above all dispute and beyond all obstruction, and the minor problems of the reform will solve themselves, by experience, under free and natural competition.

At present the tendency of opinion is strongly towards the enactment, at the present session of Congress, of some such measure as the Reagan bill, or that introduced by Senator Cullom's committee. The friends of railway reform certainly desire some assertion by the government of its purpose to stop such outrages as those which railway management has committed upon public rights, in the creation of the Standard Oil monopoly, the anthracite pool, and many minor, but no less unjustifiable, discriminations and combinations. Such legislation would be a first step in railway reform; but no complete or permanent remedy for these evils can be found in a mere prohibition of effects which leaves the causes at work. Let the history of the discriminations and oppressions inflicted by the railways upon commerce be fully understood, and the public mind will see that a single statute is too frail a barrier to withstand forces which have defied the common law and the constitutions of many states. Sooner or later, by intelligent discussion or through the failure of other means, it will become plain that the only effective reform is to destroy the cause out of which all the evils



of the system spring, by taking away the monopoly of the railways, and making them public highways in fact as well as in name.

Whether legislation shall attack the mere surface indications of these evils or strike at their root; whether the law shall seek to restrain discriminations and combinations, by establishing commissions, which may be inefficient or may become mere tools of the great corporations; whether it shall enact prohibitions of abuses, leaving their causes to work in secret and leaving the guilty parties the power and the motive to override and nullify the law; or whether it shall remove the cause of the great wrongs of railway management, by abolishing the monopoly of the corporations in their tracks, and substituting for it the free competition which prevailed on all public highways before the railway system was conceived—these questions must be determined by the power of enlightened public opinion; and when the decision is made, it will be registered in laws by Congress and the legislatures.

A proper understanding of this plan of reforming the railways will recognize its moderate and conservative character. It is conservative in its preservation of the principles, which, from the earliest stages of railway development, have been acknowledged as essential to the public rights on the highways. It aims to maintain the great principle of competition, and to give free scope to the natural laws of trade. It is conservative in its opposition to the innovation by which the railways have seized exclusive privileges on their tracks, and in antagonizing the still greater and more radical violation of principles which they are attempting, in abolishing competition through combination. It does

not resort to the novel and untried expedients of placing the vast interests of commerce under the supervision and tutelage either of government commissioners or pooling officials; nor does it rely on restricting the operations of transportation by legislative regulation, either in the interest of the public or for the support of the railway policy. The sole purpose is to preserve and make effective well-established principles of law and of trade, and to uproot all dangerous and revolutionary practices that have grown up with a new industry. Such a plan of reform, seeking to enhance the best interests of the public, and to promote the legitimate prosperity of the railroad interest, cannot be lightly rejected. Its harmony with the fundamental laws, both of democratic government and of independent commerce, must command the earnest consideration of all unbiassed students of the subject.

## CHAPTER XI.

### CORPORATIONS IN POLITICS.

WHETHER railway reform is sought by legislative restrictions, by commissions, by state ownership, or by enforcing equal rights upon the roads as real public highways, in any of these cases there will be need, first, of wise legislation, then of energetic and incorruptible officers to administer it, and finally of upright and able courts to interpret and apply it. Any reform must begin by subordinating the railway corporations to the will of the people. While the organization of both parties, in many states and even in the nation, is largely controlled by agents of these corporations, who regard all popular rights and convictions as secondary to their own interests, the work appears not only arduous but almost impossible. If the executive government can be influenced by the corporations, every appointment of a commission will merely arm them with a new instrument to amuse and delude the public; every legal prohibition will be a dead letter in administration, and the courts themselves may be made tools of monopolists. If the railways were purchased by the state, while the great railway kings can control its officers, the transfer would be the most stupendous and infamous job in financial history, and the roads would become vast and permanent engines of corruption and favoritism. Whatever is attempted is certain to be delayed at every step,

from the ward meeting to the cabinet, by the obstructive and corrupting influences of corporate wealth. On the other hand, these very obstacles strengthen the motive for reform, and furnish overwhelming reasons by which the champions of the public interests may advocate it. That corporate power, as it is now exercised, is a standing danger to popular integrity and republican freedom; that it is corrupting the machinery of government and perverting it from an agency of the people to an agency of the corporations, is the essential fact in the relations between the railways and the republic which forces the issue upon the nation. Republican government is attacked, in the centre of its life, by the persistent dishonesty and corruption with which these aggregations of greed and wealth have defiled our political system.

The power of the corporations in politics lies in the control of unlimited wealth, without the restraints of conscience. This is not hyperbole, but simple fact. When a public question is to be decided, and millions of dollars are to be made or lost by the decision, a motive is thrown into the scale which is practically resistless. The corporation, whose vast interests will be affected by political action, has no other purpose in being but to expend money for the gain of more, and knows no argument so convincing and satisfactory as the almighty dollar. Besides, if any such corporation, with an exceptional and miraculous scrupulousness, should abstain from these methods, it would be crowded out of existence by the competition of its less scrupulous rivals. The immense power of the railways for corruption is made available by the practical ethics of the corporate system, which recognize no limitations of



honor. It is an old proverb that "corporations have no souls," but it is a terrible fact of our present political life that corporations have no consciences. The impersonal entity for whose benefit legislators are bribed, or ward caucuses purchased, has no scruples at the crime. It is free from the moral restraints which govern individuals in prosecuting their interests before legislatures or courts. According to another reading of the old dogma of monarchical ethics, the corporation can do no wrong, and some one can always be found to transact the most shameless or insidious operations of public bargain and sale for its benefit. The agent of corruption is paid for infamy as part of his services; the corporation, devoid of moral character or obligations, has no compunctions to restrain it; while the highly respectable and influential members of the corporation have no connection with such corruption, save to acquiesce in it and to pocket the profits.

Such practices are not peculiar to railway corporations. They occur, to a greater or less degree, in the political relations of water corporations, electric companies, gas companies, telegraph companies, and even manufacturing companies, where their opportunities for profit can be affected by the exercise of governmental power. The railways are the greatest and most powerful of all these organizations, their interests are most directly affected by legislation and by public administration, and their relations to the public are the sole subject of this work. But the nature of corporate influence in politics is always the same. The sole aim is pecuniary profit; the impersonal character removes all limitations of conscience or personal responsibility;

and the benefits to be obtained from some legislative or judicial action, when filtered through the medium of the corporation to the pockets of its upright members, are purified of corruption. While such notions of corporate conduct are in vogue, the "best citizens," whose greater activity in politics is so widely urged, will do or permit, in their capacity as shareholders or directors, acts which they would scorn to do as individuals; and the lights of society will hold themselves clear of all such transactions, by carefully looking the other way while there is ground for suspicion that they are going on.

The methods by which corporate interests control political action may be classified broadly in two great divisions. The first includes the election or appointment of representatives of the railways to public trusts in which they can serve the corporate interests. The second covers the use of their immense pecuniary resources in downright bribery, or indirect influence, of those already holding such trusts. The first method may involve no direct corruption of the electing or appointing power. The transfer of a railway official to the Senate of the United States, or the election of a railroad attorney to a state legislature, may be secured by the high character and popularity of the candidate; but the character of the representatives in Congress and the legislatures, where the railway power is great, suggest that more tangible arguments prevail in their election than ability or statesmanship. The votes which send a railroad president to the Senate, or place a railroad attorney on the bench may not be directly purchased; yet the nominating machinery, the popular vote, may have been controlled by influences no less

corrupting and effective than bribery. However occult and insidious such influences may have been, the constant presence of known representatives of the corporations in such positions shows the deliberate purpose of the great power, whose sole end is profit, and whose methods are not restrained by moral obligations, to secure political protection and control.

The method of directly attacking the integrity of the representatives and servants of the people, to secure their adherence to corporate interests, is hazardous and expensive when applied to high departments of government, which are under the constant inspection and criticism of the public. It is therefore less frequent, as I am glad to believe, in efforts to influence the action of the national government, than the former plan. But as we go down the scale of political power and prominence, the dangers of exposure decrease, and the frequency of direct or indirect acts of corruption increases rapidly. The character of the men whose action is to be purchased renders them more easy of conquest. The necessity for keeping an unsullied reputation is less urgent, their individual means are less, and their antecedents, when drawn from the lower ranks of political life, often mark them as willing subjects of barter. Hence bribery by corporations, direct or indirect, is far more frequent in the state legislatures than in Congress; while the same practice in municipal bodies may be said to be general. It is a contribution to the maxims of corruption, by one of the lights of lobby management in Pennsylvania, that it is cheaper to buy representatives or delegates after they are elected than to elect the men wanted; and if this is true of the highest political bodies of a great state,

it cannot be doubted that corporations in cities find it most economical and satisfactory to gain what votes are wanted by downright purchase, or by equivalent measures more or less veiled.

Looking first at the high places of national government, the most prominent evidences of corporate power at present are of the class first named, the corporations having secured representation in the greatest and most responsible offices. Thus current rumor ascribes the appointment of one of the members of the present cabinet to campaign contributions, by hundreds of thousands of dollars, out of the profits of the most defiant and unscrupulous monopoly yet established by railway favoritism. Such a rumor may have no more foundation than any partisan charge, but it is pertinent as showing the estimate which public opinion places on the power of the corporations. As a partisan imputation it may be balanced by one on the other side of politics, which hints that a vast contribution to a campaign fund raised an eminent corporation lawyer to the Supreme Bench of the United States. If this be true, the danger to the public interest is far more serious. The assertion that Jay Gould paid \$100,000 to the Republican campaign fund in 1880, in return for which Judge Stanley Mathews was nominated to the Supreme Bench, is denied as a political slander; but the fact remains that this brilliant advocate of the railway theories of law has been placed in that high tribunal, and that his presence there, together with Justice Field, long a judicial advocate of the corporations, is expected to protect the railways in future against such constructions of law as the Granger decisions.

No consideration of this subject can omit to notice



the extraordinary tenderness towards the land-grant corporations, shown by one great department of the government during two administrations, and by another department during at least a portion of that time. Nothing seems to be clearer than that those corporations should have been held to a strict construction of their bargain with the government. The territory which the government could hold open for settlement by the people was rapidly being occupied; the royal generosity of the nation to these corporate favorites had in nearly every instance been abused, and a number of these companies had notoriously failed to carry out the conditions on which the public domain was granted to them. Surely the duty of the executive departments charged with such matters was plain. There might be legal technicalities, by which the forfeiture of the land grants could be avoided. There might be some doubt whether Congress should not take the first steps towards restoring the forfeited lands to the public. But it was not the part of a faithful administration to decide these questions against the people. They should be left to the courts, while the executive should hold what it could of the disputed territory for actual settlers. The contrast between what should have been done and what has been done reflects severely upon the integrity of these administrations. Legal rulings, by the law department of the nation, recognized the lands as still the property of the companies. Patents were issued by the Interior Department, on these rulings, between the closing of its offices at night and their opening next morning. Lands were handed over by tens of millions of acres to corporations which had obviously failed to fulfil the con-

ditions of the grant; and while about 130,000,000 of acres are yet in dispute, the first active steps taken by Congress or the executive for preserving these vast territories to free settlement were instituted within the last year, under the overwhelming pressure of popular opinion. Hardly anything more than the actual history of the land grants is needed to suggest to the people the question whether they or the corporations have been represented by the government.

The presence of corporate influence in the United States Senate is well understood. The railway membership of that body is the most eminent and weighty representation of the corporate cause; and its ability and respectability make it the bulwark and fortress of that cause, against remedial or restrictive legislation. The high character and large fortunes of those who have crowned their railroad career with seats in that body, generally raise them above suspicion of direct corruption, whatever may be thought of the means employed to secure their election. The number of railway representatives in the Senate cannot be exactly stated, lest injustice be done to several senators who are difficult to classify. A few years ago, it was currently asserted in public journals that nineteen senators, one fourth of the whole body, came to it from active connection with railway management, and largely as a result of that connection. This number included some senators rather recklessly assigned to the service of the corporations, and has been reduced by the more or less involuntary retirement of several. On the other hand, these losses to the railway cause may have been fully made up, by the recent addition of two senatorial representatives of the Standard Oil Company, and by

the recent entrance of the great figure-head of the Central Pacific Railway, as senator from California. It is not fair to say that these men deliberately choose to serve their corporate interests rather than the nation in public office. Many of them believe that the interests of the railways are the public interests. Their habits of life, their associations, their business training, their success in the service of the corporations, and, above all, their interests support that belief. When Senator Brown, of Georgia, last winter seriously informed the Senate that all these complaints against the railroads are unfounded, that "competition will not work in railroading," and, in effect, that the best thing for the nation is to recognize the great and unalloyed benefits which the corporations confer on the people, he doubtless believed every word that he said. His environment as a railroad president produced the conviction in his mind that he was shedding the light of truth upon a subject misunderstood; but the fact that the most radical measures of regulation have been adopted in his own state, where the aggressions of the railways have been trifling compared with those practised in some of the Northern States, proves that Senator Brown represents the views of the corporations and not the views of the people of Georgia. The presence of this large element, in the highest deliberative body of the nation, pledged to the cause of the corporations by their antecedents, their individual interests, and their real though disguised constituency, is a serious obstacle to any thorough reform of railway abuses. The obstacle is the greater from the variety of attitudes which the railway representation can assume. They can, as already said, openly advocate legislation while mean-

ing to render it futile. No doubt many of the senators who voted for the Cullom bill sincerely desired some conservative and reasonable remedy for the evils it prohibits; but there is also no doubt that the bill was passed in the Senate by votes designed to prevent any legislation, while appearing to favor it. The railway interest in the Senate is a bulwark, which the corporations have been erecting about their cause for years. The value of a representative in that body has been long recognized by the great corporations. The demoralizing means by which some such representatives were placed there, concern most nearly state politics; but one conspicuous instance is worth recalling in this connection.

Two senators in the present Congress represent, in name, different states, but in reality one great petroleum-refining corporation and master of the trunk lines. One of them was a member of the House of Representatives in the Forty-fourth Congress. Whether the Standard Oil Company has any immediate object to gain from the national government does not appear; and perhaps its recent acquisition of a seat in the cabinet and two seats in the Senate are simply luxuries, such as overgrown riches can afford to indulge in. But in the lower house, these gentlemen were of use to the corporate cause, in smothering one of the earliest attempts at Congressional inquiry into the discriminations which made that monopoly a success. On May 16, 1876, a resolution was introduced in the House of Representatives for investigating discriminations, which by the objections of Mr. H. B. Payne, then a member from the Cleveland district, was first deferred, and then put in the hands of the committee on commerce. There Mr. J.



N. Camden, the head of the West Virginia branch of the Standard Oil Company, appeared as the adviser of his representative, the chairman of the committee, and, after a perfunctory opening of the investigation, had it shelved, the question arising whether Mr. A. J. Cassatt, of the Pennsylvania Railroad, should be forced to testify on the subject of special contracts. The present prominence of the question would make it impossible for Senators Payne and Camden to smother investigation in the Senate; but that they may yet in some way serve the cause of monopoly is not the less probable, because Senator Camden assumes the guise of a legislator who is in favor of restricting railway abuses. A story of a partnership between the two senators from New Jersey, as legislative agents of the Pennsylvania Railroad, which attracted some attention last year, has been denied under oath by the persons involved, and must not be repeated here. But it is, nevertheless, an important fact that one of the senators, an ex-railway official, represents the cause of the corporations in that body.

The constitution of the House of Representatives, at present, is much less favorable than that of the Senate to the political supremacy of the corporations. Some members there are, like the Honorable W. L. Scott, recently elected from Pennsylvania, whose fame is solely that of railway millionaires, and whose vast fortunes are largely the direct result of the discriminations reviewed in this work. On the other side of the House, the champion of the railway cause in last winter's debate has placed himself on record as having promoted corporations which deliberately issued stock and debt to three times the amount of the cash investment,

and imposed the inflated issues on the public. But the House is more directly in connection with the people than the Senate; and it is an encouraging sign of the progress of public opinion on this issue, that a great majority of its members in the last session accepted the measure which was presented to them as most efficient for restraining the principal evils in railway traffic. The records of the House of Representatives, however, furnish a terrible warning against the corporate practice of gaining the support of members by pecuniary influence. The most conspicuous instance is found in that cemetery of political reputations, the report on the *Credit Mobilier*. The insidious approaches by which agents of corporate schemes, unrestrained by any scruples, gradually bind the people's representatives to their interests, are manifold; but this wholesale murder of national characters typifies them all. How many of the Congressmen, who were quietly and plausibly induced to take shares in that great and successful public swindle, knew that they were becoming tools of corporate adventurers, it is hard to tell. Some of them, doubtless, thought, as they pleaded in their defence, that they were simply sharing in the general prosperity. Others, no less certainly, took care to quiet their consciences by looking only at their profits. The salient fact is, that a score of most promising careers were cut short, by the discovery that they had been used by the Pacific Railway speculators. Such corruption assumes a hundred forms. Gifts, loans, investments, favors of infinite variety may be brought to surround a public man; until all his circumstances and prospects tie him to the cause of the corporations. The knowledge of what has been done, and especially the epi-

taphs on political prospects, slaughtered by the Credit Mobilier, must always show what unscrupulous and irresponsible corporations can effect, in corrupting the highest political instrumentalities.

A striking illustration of this power, as exercised upon the machinery of politics, is afforded by the highest candidates of the two great parties in recent political campaigns. The acknowledged head of one great party, who in his retirement sways its counsels, and in his former candidacy for the presidency achieved the utmost possibilities of perfect organization, aided by liberal expenditure, owes much of his prominence to a great fortune secured by years of railway operations. On the other hand, two of the presidential candidates of the other party have been accused of connection, during their congressional careers, with corrupt schemes of the Credit Mobilier variety. One of them, now in his grave, denied all such imputations; the other has often asserted that his investments were legitimate. It is not the purpose of this work to take part in partisan assaults and accusations. But, apart from the question whether the relations of Tilden, Garfield, or Blaine with corporations were in any way inconsistent with their personal integrity, the unquestioned facts are significant. Men who have held the highest honors of both parties have been connected closely with the corporate cause; at least two of them were so intimately allied with the railways by their personal interests and private fortunes that, upon any issues between the welfare of the people and the corporations, their predisposition would be in favor of the railways. Add to these great names the list of second-class railway magnates, who have, in their political careers, swayed the ma-

chinery of parties as chairmen, secretaries, or members of the national committees, and it may well be questioned whether the railway power is not more controlling in the organization of the two great parties than in the national government.

That a great industry, employing the highest order of administrative ability, and extending all over the land, should furnish members of Congress and managers of political campaigns, is natural. Indeed, in the present development of our politics, when each great interest claims its representation in legislatures, the railway interest may have as good a right to send senators and representatives to Congress as the silver interest or the iron interest. When we reach the political millenium, in which every public man will represent the whole people, or when the railways are so organized that there is no antagonism between their aims and the public welfare, the presence of such men as some of those whom the railway power has placed high in politics will be a subject of approval rather than criticism. But when, in the presence of a great question, on which the railways are united against the public interests, we find them steadily but stealthily filling the highest places with their representatives and agents, the danger of their political influence is obvious. Every representative of the railways in high office is an additional threat against popular supremacy. Its serious nature will be better understood, if we examine the operations of the corporations upon some of the lower levels of politics.

Our limits forbid any detailed examination of the cases in which railway corporations have purchased or controlled the legislatures of states or the councils of



cities; but reference to two or three glaring instances will suffice. The most conspicuous of all is the complete control which a great corporation has had, for twenty years or more, over the State of Pennsylvania. The old joke of moving to adjourn the legislature of that state, "if the Pennsylvania Railroad has no more business for this body to transact," dates from the early stages of corporate development; but hardly a legislature has convened in that state, for many years, in which it would have been felt to be pointless. With one brief interval of legislative independence, the laws of the commonwealth, as far as that corporation has any interest in them, have been made by its managers and registered by the legislature. When the Pennsylvania Railroad joined the conspiracy to build up the Standard Oil Company's monopoly, it was expected, as its share of the contract, to control legislation in Pennsylvania as well as the rates of transportation; and the contract was fulfilled in one respect as in the other, until the law-makers of two years ago, with exceptional independence, passed a free-pipe law. This body was elected in a year of popular revolt, in the Republican party, from the domination of a corrupt "ring," whose defeat attracted national attention, its influence having extended to national politics. This political cabal named legislators and Congressmen, nominated governors, sent packed delegations to the national conventions, and relegated to private life public men whom it could not use. But it has not been so widely understood that its head, when elected to the Senate of the United States, was president of a great railway tributary to the Pennsylvania Railroad, and that the active managers of the cabal are the paid agents and lobbyists of

the corporation. Aided by the contributions of the railroad, it has swayed for years the politics and legislation of the second state of the Union. The natural result has been the degradation and infamy which have characterized the political life of the state.

The public mind was shocked in this state five years ago, by the exposure of the riot-claims bribery, for which a leading agent of the corporation was sentenced to the penitentiary. But the only surprising facts in the case were the exposure and sentence. The crime, though perhaps on a smaller scale, had been made familiar by frequent repetitions. The riot claims were founded on the losses of the railway in the riots of 1877. The railroad corporation presented to the legislature an exaggerated estimate of the damage; and the attempt to impose the burden, amounting to \$4,000,000, on the tax-payers of the state, excited popular protest, so that the bill was defeated by a small majority. It was in his efforts to secure its passage that the principal lobbyist of the corporation was afterwards proved to have been guilty of bribery. This man, W. H. Kemble, of Philadelphia, was convicted and sentenced for the crime; but the day after the sentence was imposed, the pardon board of the state relieved him of the penalty. Mr. F. B. Gowen, who opposed the riot claims, as the head of the railway which, next to the Pennsylvania Railroad, is the largest tax-payer in the state, was active in the investigation of the bribery, and afterwards publicly declared in Philadelphia, of the lobby agents, municipal wire-pullers, and jury-fixers of the state, that "all of this loathsome class of malefactors were working in the interests of those of whom one

swore that he was employed by the Pennsylvania Railroad Company."

The influence of the railway upon legislation, which had been weakened by these exposures and by the popular agitation of 1882, was revived in the last legislature, which refused to enforce the provisions of the state constitution for the restriction of the railway power. Bills were proposed simply providing proper penalties for the violation of these provisions. Yet the railroad masters of the legislature determined that these provisions, framed by a convention of the best minds of the state, and approved by an overwhelming majority of the popular vote, should not be enforced; and both branches of the legislature obeyed them, and refused to pass the bills. Like the attempt now making to complete the purchase, by the same corporation, of the South Pennsylvania Railroad, in defiance of the constitution, which prohibits the purchase of parallel or competing lines, this event shows that, in the State of Pennsylvania, the will of the railway is greater than the law. But worse remains to be told. The corruption of the judiciary is a still greater offence than any which have been mentioned; and the sarcastic remark in a legal text-book, that the Pennsylvania Railroad runs the Supreme Court of that state with the same success that it does its own trains,\* points to the suc-

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\* John D. Lawson, in his work, "Leading Cases Simplified," referring to the decision in the case of *Thorogood vs. Bryan*, says: "The American courts decline to follow it, except in Pennsylvania. Here, perhaps, is the place to warn the student, so far as the law of carriers is concerned, not to pay much heed to the decisions of the Supreme Court of Pennsylvania, at least during the past ten or fifteen years. The Pennsylvania Railroad appears to run that tribunal with the same success that it does its own trains."

cess of its persistent policy of placing its attorneys on the bench.\*

There are some signs of an attempt to throw off the railway rule in this state. The Democratic governor, elected in the political upheaval of 1882, has, in each of his messages, urged upon the legislature the duty of making the constitutional restraints effective by law. His attorney-general has recently brought a suit in equity to stop the scheme for buying up the South Pennsylvania project and crushing out competition. If he succeeds in enforcing the constitutional prohibition against the absorption of rival routes, it may yet appear that the constitution in Pennsylvania is not permanently subject to the will of the corporations. The corporate authorities, however, seem confident of success; perhaps expecting that the Supreme Court will uphold, in their behalf, any pretence for nullifying the constitution. But their course is likely to strengthen the minority party, which, at the recent convention, declared itself against railway discriminations, in favor of upholding the constitution, and of restraining the railway power. Should the Supreme Court aid the railway power in nullifying the constitution, and should the Democratic party show itself in earnest, a political revolution may result which will overturn the rule of the Pennsylvania Railroad.

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\* But while this work is in press the same court has decided, in the case of *Duncan vs. the Pennsylvania Railroad*, that the company is liable for consequential damages caused by its appropriation of lands. The reasoning in this case destroys the pretence that the charters of the older roads exempt them from control by the state constitution of 1874, and perhaps shows that the court will enforce other provisions of that instrument which the railways have defied, and thus end some of the most important abuses we have described.



This corporate supremacy, through the Republican party in one state, finds a parallel in another state under Democratic ascendancy. The power of the Standard Oil Company in the Democratic legislature of Ohio has been asserted in the election of a United States Senator, and in the defeat of a bill to give competing refiners equality in pipe-line transportation with that monopoly. It has been charged that wholesale bribery was used to secure these results. Such charges by political opponents might not command belief, although the persistent refusal to investigate them is suspicious. But the Democratic agent of the bribery has acknowledged it. During the last session of the body, stigmatized by its partisan opponents as "the coal-oil legislature," the legislative agent of the "ring," which is credited with its control, appeared on the floor in a state of gross intoxication. The offence was too public and notorious to be overlooked, and a committee was appointed to enforce discipline. Before the committee had begun its work, the offender declared that the House dared not discipline him; that he had paid too many members money for their votes; that he had a list of those who had been so purchased; and that, if he were punished for his behavior, he would expose a majority of that body as having accepted bribes. The excitement was great; the challenge was accepted; he was called before the committee and asked for the list. He then retracted his charge, and all further proceedings against him for his outrage upon the rules of the House were quietly dropped.

The corrupting interference of corporations in state politics, such as we have referred to in Pennsylvania and Ohio, has been notorious in other states. The rule

of the Central Pacific in California, and the assertion made in Congress that the Union Pacific maintains a political organization in Nebraska, and has already ordained the defeat of Senator Van Wyck for his attacks upon the railway power, during the debates last winter, are illustrations that might be multiplied. Some states are so fortunate that either the watchfulness of their voters or the insignificance of their corporations preserves them largely from such corrupting influences; but in many there have been political scandals fully as disgraceful and dangerous as any of those mentioned. The history of such transactions in New York is widely known, and has been thoroughly treated by other writers, so that a mere reference to it will suffice. It is notorious that the railways of that state have obtained legislation to sanction the abuse of stock watering, whenever they wanted it. After the searching investigation of the Hepburn committee, the corporate power was able to defeat its measure for railroad regulation, and to substitute in its place a commission without power. A striking picture of the methods of the corporations, in dealing with legislation in that state, was furnished by the testimony of Mr. Jay Gould.

This prominent railway operator has been described by his subsequent fellow-director in the Union Pacific Company, Mr. Charles Francis Adams, as "a man without a conception of morality." He and Mr. C. P. Huntington have made valuable contributions to the literature of the subject, showing how railway corporations corrupt politics. Mr. Gould's statement, before an investigating committee, of the methods employed to advance the interests of the Erie Railway, can never lose

its instructive character. The funds of the corporation were used, by the plunderers controlling it, to elect members of the legislature who would support their schemes. They cared not a whit whether their political tools were Republicans or Democrats. All that was needed was that they should be elected; and so Mr. Gould artlessly says, "We were Republicans in Republican districts, and Democrats in Democratic districts, but always for the Erie Railway." The companion picture furnished by the Huntington letters, published last year, throws no less light on corporate lobbying in Congress. Here, in the confidence of private correspondence, we learn from the railway kings how some statesmen serve the corporations, under the pretence of opposing them; how editorial opinions in leading journals are a good investment for the corruption fund; how unsuspected lobby agents are set to work, apparently without concert, but under secret orders from one head; how, in short, the unlimited resources of great corporations employ all that is unscrupulous, wily, disreputable, and dangerous in politics, to attack members in their weak points, to flatter, bribe, and control them, so that they must support the corporations. Messrs. Huntington and Gould are good witnesses to the danger and corruption of representative institutions, wherever great corporations bring their unlimited wealth and their conscienceless tactics to bear on politics or legislation.

Instances might be multiplied, in which corporate unscrupulousness and legislative greed and weakness have conspired to promote legislation in the interest of the corporations and to the detriment of the people. For the purposes of this work, it is only necessary to

point out the extent of this corruption, and the fact that it seems to be associated with the administration of the greatest and most eminent railway managers. That it has long been at work, and had reached an appalling extent at a comparatively early period, is shown by the testimony of the treasurer of the New York Central Railroad nearly twenty years ago, before a committee of the Constitutional Convention of the State. He admitted that the amount advanced to the president of the company, for "expenses pertaining to the legislature," was \$60,000 dollars during a single session, and that during the preceding two or three years it had been \$205,000; that no records or entries were made of the disbursements; that the board confirmed the advance after it had been made; and that the item was simply "charged to the treasurer's office and remains there." The expenditure of such a sum for such a purpose might well be considered startling enough; but that it was rivalled or even surpassed by another corporation of the same state, was shown by the declaration, a few years later, of the committee before which Mr. Gould's testimony, already referred to, was taken, that the revolution in the management of the Erie Company "laid bare a chapter in the secret history of railroad management such as has not been permitted before." Yet soon after this revelation, the failure of either corporations or legislators to lay the lesson to heart was shown by the passage of a bill for "the Fourth Avenue improvement," in New York city, in the interest of the New York Central and Hudson River Railroad, which was secured by such methods that a member of the legislature, from the city, resigned his seat in disgust, and declared, in a



statement to his constituents, that it was impossible to fight against the corrupt corporate influences. How persistently this power of corruption has been employed in later years, and with what impunity to its agents, may be seen by recalling what occurred in New Jersey in 1882. A bill to secure to the railroads the control of the entire water-front of Jersey City was vetoed by the governor. Notwithstanding his exposure of the scheme, an attempt was made to pass it over the governor's veto, and the means employed were disclosed under oath by a member who had been approached. He was asked to solve a mathematical problem, couched in the following suggestive terms: "As your vote is to 167, so is \$500 to your answer;" and when he said that twice the amount might make him answer, he was told that \$500 was what the other members were getting, except those who were engaged as attorneys for the bill. Finally, upon advice from his friends, the member accepted an increased offer of \$500, to be left in his room, and \$500 to be paid after the passage of the bill. The money was left in his room, the bribery was at once exposed, an investigation was ordered, and the committee reported that the bribery was fully proved and named the guilty agent. It is a significant indication of the power of corruption, over both the making and the execution of the laws, that after the lapse of three years, the agent in question has not been brought to trial, although New Jersey justice is proverbial for its promptness.

Again, it was asserted in Massachusetts, in 1882, that, in a single day, corrupt efforts to influence members were made by the lobbyists of one railroad corporation against a pending bill, and by those of another in

its favor. In view of such facts, the doubt arises whether it is possible for the railway interest to approach the legislatures for any action, without producing venality and corruption.

These are a few examples of the effect of corporate interference in politics. The instances of political corruption, which have come to light in the last twenty years, have prompted severe comments on the downward tendency of our politics. The Credit Mobilier exposures, the land-grant dishonesty, the "machine rule" in Pennsylvania, the Erie railway corruption, have been represented as proofs of moral degeneracy. But what the indignant public have not generally perceived is, that the secret source of all this dishonesty is in the wealth of the corporations. Not that there are no rascals but those paid by the railways. But these irresponsible bodies offer the most remunerative employment for political rascality; and thus they have become the stronghold and source of nearly all bribery and betrayal of public trusts. Wherever there is a powerful, disciplined, and unscrupulous "ring" of political managers in control of legislation, there can nearly always be found, in the background, some great line of railway, whose interests occupy the ring, and whose money rewards it. On the other hand, wherever a great railway controls legislation, or places its representatives in high office, whether in Maryland or New York, Pennsylvania or California, there will be found the centres of political venality which threaten to reduce our politics to a competition in corruption. It is the inevitable result of the entrance of the railways into politics. Impersonal powers, whose only moral characteristic is greed, will inevitably find political agents without scru-

ples, to secure their ends. They will naturally ally themselves with the lowest class of politicians.\* But the lowest class of politicians becomes the most powerful, when wielding the unlimited resources of the corporations, and acting in concert with their respectable managers. The demoralizing influence of the dishonest class in politics has been the theme of political essayists; but they have commonly failed to discern the invisible ties which unite that class with the kings of commerce, who support it by their money and profit by its disgraceful services.

The root of the railway power in politics is to be

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\* This has been so forcibly stated by Mr. Charles Francis Adams that an extended quotation is pertinent:

"There is a natural tendency to coalition between them and the lowest strata of political intelligence and morality, for their agents must obey, not question. They exact success and do not cultivate political morality. The lobby is their home, and the lobby thrives as political virtue decays. The ring is their symbol of power, and the ring is the natural enemy of political purity and independence. The existing coalition between the Erie Railway and the Tammany Ring is a natural one, for the former needs votes, the latter money. This combination now controls the legislature and courts of New York. That it controls also the executive of the state, as well as that of the city, was proved when Governor Hoffman recorded his reasons for signing the infamous Erie director's bill. It is a new power for which our language contains no name. We know what aristocracy, autocracy, democracy, are; but we have no word to express 'government by moneyed corporations.' Yet the people already instinctively seek protection against it, and look for such protection, significantly enough, not to their own legislatures, but to the single autocratic feature retained in our system of government—the veto by the executive. . . . The next step will be interesting. As the Erie ring represents the combination of the corporation and the hired proletariat of a great city; as Vanderbilt embodies the autocratic power of Cæsarism introduced into corporate life, and as neither alone can obtain complete control of the government of the state, it perhaps only remains for the coming man to carry the combination of elements one step in advance, and put Cæsarism at once in control of the corporation and of the proletariat, to bring our vaunted institutions within the rule of all historic precedent."

found in the lobbies which bribe legislators, and in the ward politicians who control votes for money; and the ability of those low elements to make themselves felt in our political system lies in the corruption funds which they draw from corporate resources.

This is the political power which must be overcome, to make commerce independent of the railways, and to purify our politics. Its magnitude and danger cannot be overstated; but they should arouse the entire nation to the task of destroying it. The subject cannot be dismissed without referring again to the weighty words of the writer who first exposed these evils: "Political corruption is the foundation on which corporations always depend for their political power." He foretold, with almost prophetic accuracy, the danger of permitting the expansion and consolidation of the railways without check or regulation.\* The threatening

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\* "Everywhere, and at all times, however, they illustrate the truth of the old maxim of the common law that corporations have no souls. Only in New York has any intimation yet been given of what the future may have in store for us should these great powers become mere tools in the hands of ambitious, reckless men. The system of corporate life and corporate power, as applied to industrial development, is yet in its infancy. It tends always to development—always to consolidation—it is ever grasping new powers or insidiously exercising covert influence. Even now the system threatens the central government."

"Though the regular process of development may be depended upon, in its ordinary and established course, to purge American society of the worst agents of an exceptionally corrupt time, there is in the history of this Erie corporation one matter in regard to which modern society everywhere is directly interested. For the first time since the creation of these enormous corporate bodies, one of them has shown its power for mischief, and has proved itself able to override and trample on law, custom, decency, and every restraint known to society, without scruple and, as yet, without check. The belief is common in America that the day is at hand when corporations far greater than Erie—swaying power such as has never in the world's history been trusted in the hands of mere private citizens, controlled by single men like Vanderbilt, or by combinations of



influence, which he exposed in its early stages, has now attained the strength of maturity, and in the magnitude of its domination over politics it calls for the union of the whole popular strength against it. Not less for the removal from politics of vast financial resources, employed by conscienceless bodies, than for the emancipation of commerce from anomalous combinations and monopolies, must the power of the people, which is the source of all legislation, be exerted, to assert the supremacy of the public interests and the subordination of the corporations.

Nothing but the power of the united people can successfully cope with the power of the corporations. Whatever measure of reform is persistently demanded by an enlightened public opinion will be established by law, and eventually upheld by the courts. The first condition of reform, therefore, is a comprehensive and thorough understanding of the subject by the people. Every man in the nation ought to know how public rights are affected by the abuses of the existing system. To know that corporations are powerful and that individuals are weak will not suffice. It should be as familiar to the public mind as the multiplication table, how the monopoly of the railways in transportation enables them to discriminate in rates, to crush out independent trade, to extinguish small merchants, and to dominate great commercial interests; how their combinations to control industries tend to oppress production and to keep down wages; how they suspend work through indefinite periods for selfish ends; how

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men like Fisk, Gould, and Lane—after having created a system of quiet but irrepressible corruption, will ultimately succeed in directing government itself.”—*C. F. Adams.*

their efforts to establish a centralized control over the entire transportation of the land, by a single unauthorized and irresponsible agency, has resulted, and may again result, in oppressing the consumer of the great agricultural staples while impoverishing the producer, by imposing artificial burdens upon the interchange of products; and, finally, how the tendency of their practices, as a system, is to concentrate all the profits and rewards of industry in the hands of a few, while the people at large have little share in the benefits accruing from the march of improvement. It should be understood that, while such aggressions are not universal on the part of the railways, yet, at present, the power to commit them is inherent in every corporation which has the exclusive privilege of transportation upon a public highway, and that the temptation to use this power must continue as long as that exclusive privilege is maintained. Let the causes of these evils be universally understood, and public opinion will compel legislation to remove them.

Under a political system whose ultimate power rests with the masses, the demands of the public welfare will ultimately prove superior to all obstructions interposed by corporate wealth. But the struggle will be severe, and public opinion must be aroused to an arduous and long-continued effort, in order to attain thorough and permanent reform. It would be better for the railway interest, as well as for the public at large, if the necessary legislation could be secured without bringing the subject into the arena of politics. But the course of the leading corporations, which have intrenched themselves in the control of legislatures, in the possession of many seats in both branches of Congress, and even

in the citadel of justice, the Supreme Court of the United States, leaves slight hope that a popular victory can be so easily won. The reform, which shall make free the highways of commerce, can only be fully secured after a long and earnest struggle, which shall drive the railway power from the control of legislation, shall raise the executive above all temptation to court the support of corporate wealth, and shall put the judiciary beyond the suspicion of bias in its favor. The sooner this struggle begins, the better is the prospect that the end may be peacefully attained by legislation; and the longer it is delayed, the greater is the danger, from the growth, on the one hand, of the railway power, and on the other of an irresponsible and reckless proletariat. The one threatens the nation with the domination of a privileged class in its great corporations; the other with an outbreak of the destructive and ruinous spirit of revolution. If the railways go on as they have begun; if they continue to purchase legislators, to count seats in Congress as their property, and to nominate judges to the higher courts; if they continue to warp legislation to the support of railway supremacy; if they continue to erect artificial barriers to the free operation of great industries, and to concentrate the profits of commerce by their favors to the privileged few; if they continue to secure the enforcement of laws which protect their privileges, and to nullify those which restrict them; if they delay and prevent the passage of laws to regulate them and restrain their power, and cozen the public with deceptive measures—in a word, if all the features which now mark the influence of great corporations in politics are maintained and perpetuated, in defiance of efforts to restrain

them by peaceful means, the result will inevitably be, that one day their injustice and usurpation will be punished by a revolt of the classes they have wronged, beside which the French Revolution will seem an equitable and peaceful reform.

To prevent such a calamity, all lovers of free institutions, and of government by constitutional and peaceful methods, should unite their efforts. The stability of republican government, as well as the independence of our commercial institutions, depends upon an early and decisive assertion of the principle that the public welfare shall be paramount to the will of any corporate magnates. Whatever may be the discouragements, and however powerful the influences to be overcome, all honest, independent, and thoughtful citizens of the republic should unite in resolving that this land shall not be left under the domination of the great railway corporations, but shall be kept true to its original form of government by a free and intelligent people. For this end, no less than for the immediate vindication of the freedom of trade from all the abuses that have been considered in these pages, the public effort should be earnest and unremitting, to assert the supremacy of constitutional principles over corporate power, and to reduce the railways to the function of public servants, instead of leaving them in their present attitude of public masters. A thorough and lasting reform can only be secured by taking away their exclusive privileges, and placing their roads on the legal basis of public use, which governs all public highways. The unrestricted independence of trade and manufactures, the legitimate prosperity of the railways themselves, and, finally, the supremacy of free institutions and the sta-



bility of representative government, are concerned in the earnest and devoted advocacy of such a reform. With these vast interests at stake, all who have the public welfare and true interests of the nation at heart must support, with their utmost strength, the effort to make commerce free and avert the evils of corporate plutocracy.



## NOTE TO THE SECOND EDITION.

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SINCE the first edition of this work went to press, several events, with an important bearing on its subject, have taken place. Among them is the decision of the Supreme Court of the United States on the Southern Express cases,\* which considerably weakens the force of the use made of the state and circuit court rulings on the same subject, in the chapter on "The Law and the Railways." In this decision the final tribunal reversed the decisions below, which held that the railways are bound to afford transportation and accommodations to all express carriers on exactly equal terms. A railroad attorney, representing a corporation interested in excluding competing express companies from its line, tells me that, in his opinion, the case was decided with reference to the questions whether it was the duty of the railroad to provide passage for express messengers; to set aside a portion of its own cars for their use; to provide depot room at its stations, and to furnish other minor facilities; and that, in his judgment, the equal right of all express companies to obtain transportation for their own cars over any railroad, would be upheld by the Supreme Court. Some support is given to this view by the remark of the court that the question was "not whether the railroads shall carry express freights for express companies, as they carry like freights for the general public, but whether it is their duty to furnish for the Adams Company, or the Southern Company, facilities for doing business on their roads, the same in all respects as those they provide for themselves or afford to any other express company." This question was decided in the negative upon an argument as to the usage of railroads, which, it was said, do not hold

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\* Southern Express Cases, 117 U. S. Reports, p. 1.

themselves out to be "common carriers of common carriers," and as to the impracticability of affording equal accommodations to all the express companies who might call for transportation over a single line. This, it is to be observed, is a question of practical railroading rather than of law; and was answered in Justice Miller's dissenting opinion by the remark that, until the number of express carriers becomes oppressive, it is not necessary to consider the objection. This decision does not, by any means, deny the doctrine of the public highway; but in overruling some extreme applications of that doctrine to the express business, it shows a tendency to ignore the obligations of the railways in that character and to consider them solely as common carriers, which, to say the least, is an unfortunate departure from the position taken by Walworth, Baldwin, Black, and their judicial contemporaries.

That tendency seems to be emphasized by the still more recent decision in the *Wabash, St. Louis, and Pacific Railway vs. the State of Illinois*.<sup>\*</sup> In this case, arising out of an act of the Illinois Legislature, to prevent a greater charge for a shorter haul than for a longer one including the shorter, the Supreme Court virtually reversed its own ruling in the *Granger* cases, referred to on page 127, that state legislation can, in the absence of regulation by Congress, exercise its control of such inter-state commerce as affects the citizens of the state, by beginning or terminating within its limits. Mr. Justice Miller, in the opinion of the majority of the court, asserts that this point was not prominently considered in the *Granger* cases; but, as Justice Bradley showed in his dissenting opinion, it had been prominent in numerous other cases which sustained this right of the states. The reading of Justice Bradley's dissenting opinion, concurred in by Chief-Justice Waite and Justice Gray, leaves the honors of the legal argument with the minority. It is shown, with much force, that the very existence of the railways rests upon the same authority which the state exerts in regulating them; that state legislation has created the public highways by which traffic

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<sup>\*</sup> The regular volume of U. S. Reports containing this decision is not yet published; but it is fully reported in the *Supreme Court Reporter*, vol. vii., No. 1, p. 4.



is transported from one state to another; that the same principles by which the state legislatures can authorize the charging of tolls on inter-state traffic enables the same bodies to regulate those tolls; and that the power of the state over such traffic on the railways, as affects its citizens, is exactly the same power which has given the railways their charters and secured for them their rights of way.

This decision does not overthrow the authority of the state to regulate railway traffic. On the contrary, it affirms that power with regard to traffic confined strictly to the limits of the state. But it increases the importance and necessity of national legislation by declaring its authority, and denying any other, over all traffic passing beyond state lines. This enhances the interest attending the progress of Congress towards the passage of an inter-state commerce bill. At the time of writing, the prospect of legislation by Congress, such as is indicated in "*The Discussion of Remedies*," combining the salient features of the Reagan and Cullom bills, is very good. After another session, in which each branch of Congress insisted upon its own measure, the present session commences with an agreement in conference committee, just as the second edition of this work is going to press, upon a bill which unites the commission feature of the Cullom bill with most of the prohibitions and civil remedies of the Reagan bill.\* The strong provisions of the bill on the subject of dis-

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\* This is so important as the result of an agreement between the two leading Congressional advocates of inter-state commerce regulation, and it supplants to so large a degree the measures previously framed, that a summary of it is necessary. It prohibits discriminations, "directly or indirectly, by any special rate, rebate, drawback, or other device," on "like and contemporaneous service . . . under substantially similar circumstances and conditions;" forbids "any undue or unreasonable preference, or advantage, to any particular person, company, firm, corporation, or locality;" requires reasonable and equal facilities for the interchange of traffic between common carriers, and forbids discriminations between connecting lines. The long and short haul provision forbids a greater charge "for a shorter than a longer distance over the same line, in the same direction, the shorter being included within the longer distance," with the proviso that the Commission may, in special cases, upon application and investigation, prescribe the extent to which the designated common carrier may be relieved from this prohibition.

criminations between the long and short hauls, and still more, the entire prohibition of pooling agreements, will have aroused the hostility of railway influences which were otherwise dis-

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The prohibition of pooling is that of the House bill, forbidding "any contract, agreement, or combination with any other common carrier or carriers for the pooling of freights of different and competing railroads, or to divide between them the aggregate or net proceeds of the earnings of such railroads or any portion thereof," and each day of the continuance of such agreements is constituted a separate offence. The section with regard to the publicity of rates requires each carrier to state its rates and charges between the stations on its road, in plain, large type, in schedules subject at all times to public inspection; and in addition the Commission is authorized, in proper cases, to require carriers to post their through rates to other points than those on their lines. Ten days previous notice is required for an advance in rates, but a reduction can be made immediately upon publication of the change. To charge, demand, or collect either more or less than the published rates is made an unlawful act.

The remedies provided by the bill comprise those in the Reagan bill, with the exception that the aggrieved shipper may not select the state courts for civil suits under its provisions. Parties claiming to be injured may seek their remedy through the civil courts on their own account, or through the Commission, but they may not pursue both remedies concurrently. The remedies by common law or statute are not in any way abridged, but these provisions are stated to be in addition to such remedies. The violation of any of the provisions by any common carrier renders it liable to the person injured to the full amount of damages, to be recovered by civil suit, together with a reasonable attorney's fee in case of recovery, to be fixed by the court, and taxed as part of the costs. The violation of the act by a common carrier, or by any representative of an incorporated common carrier, is made a misdemeanor, subject to a fine not exceeding \$5000. On civil suits the court may compel directors or officers of the defendant corporation to testify and produce books and papers; and the plea that such testimony may criminate the witness is excluded, with the proviso that the testimony thus obtained shall not be used against the witness on a criminal proceeding.

For the further enforcement of the act, a Commission is created, consisting of five commissioners, not more than three of whom shall be appointed from the same political party, and none of whom shall be interested, as official, employee, stock or bond holder of any corporation subject to the provisions of the law. The salaries of the commissioners are fixed at \$7500 per annum, and that of the secretary of the commission at \$3500. Any person complaining of the violation of the provisions of this law by any common carrier may apply to the Commission by petition; upon which the Commission shall notify the common carrier,

posed to support the Cullom bill as a preventive of more radical legislation. The arguments brought forward against the former provision are principally noticeable for their extreme-

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and require it to satisfy the complaint within a reasonable time, to be specified by the Commission. If reparation is made within the time, the common carrier is relieved of liability for that particular violation of law. If not, it is the duty of the Commission to investigate the complaint, to determine what reparation is required to the party injured, to notify the common carrier to make the reparation found to be requisite, or to cease from the violation of law, or both, and its finding shall be entered of record. If the common carrier complies with the finding, it is relieved of further liability for that particular violation of the law. If it does not satisfy the finding of the Commission within a reasonable time, to be specified by that body, the Commission is to apply to the Circuit Court of the United States in the district where the common carrier has its principal office, for proceedings in equity. In such proceedings, the investigations and findings of the Commission are made *prima facie* evidence; and the court, after summary proceedings, is authorized to issue an injunction, mandatory or otherwise, requiring the common carrier to cease from the violations of law complained of, and to obey the orders and requirements of the Commission; and for failure to obey such injunction the court may require the payment by each carrier or person in default, a sum not exceeding \$500 for each day that the failure to obey the order continues. Where more than \$2000 are involved, either party may appeal to the United States Supreme Court, but such appeal shall not stay or supersede the orders of the court, or the execution of writs and processes.

The Commission is also authorized to conduct investigations on its own account, or upon the application of any railroad commission or commissioners of any state. It is authorized to require annual reports from all common carriers subject to the provisions of the act, and to require specific answers to all questions on which the Commission may need information. It may also, in its discretion, prescribe a uniform system of accounts, and fix a time for adopting it. Its regular sessions shall be held in Washington; but it may, for the convenience of the public or the interested parties, hold special sessions, or authorize investigations by one or more of the commissioners in any part of the United States. It may invoke the aid of the United States Courts to compel the attendance of witnesses and the production of books, papers, and documents. For the purposes of this act the circuit courts of the United States are held to be always in session, except as to the penal provisions. The Commission is to make an annual report containing such information and data collected by the Commission as may be of value, together with such recommendations as that body may deem necessary.

ly amusing character. It allows a railroad to charge as high a rate on shipments of grain to New York from Ohio as from Illinois, and from Illinois as from Nebraska or Dakota. Of such a provision the most brilliant railway president of the time declares that it will depreciate the value of Western lands fifty per cent.; while an influential daily journal asserts such an enactment might levy an embargo on the products of the more remote districts. Such arguments carry their refutation by proving too much. The rate which is an embargo on shipping grain from Dakota would be equally an embargo on grain from Illinois or Ohio; and if the inability to carry it for trans-Mississippi farmers at actually less money than for those in Indiana will depreciate the lands of the former fifty per cent., what havoc must the opposite practice have wrought upon the value of the property of the latter. No embargo is imposed by the proposed law; but it is laid down that the railroads shall not have the power to lay the embargo on the short haul for the benefit of the remote shippers, to the extent implied in carrying freight a thousand miles at less charges than for carrying it five hundred.\*

The argument against the prohibition of pooling takes a more specious form, being based upon statements that are by no means borne out in the history of pooling. It has been asserted, in a variety of forms, that railway pools are beneficial to the public by maintaining stability of rates and preventing discriminations. Such violent distortions of the fact that rates have undergone their wildest fluctuations since the introduction of pooling, and that the greatest discriminations have been maintained by the most successful railway pools, are sufficiently answered in the preceding chapters; but the assertion of the *Independent* that the favoritism which built up the Standard Oil Company's monopoly "would have been impossible under a well-organized pooling system," deserves especial mention for its remarkable ignorance of the facts in that notorious infamy. The truth is that, except for the combination between competing railroads, which is the essential feature of pooling, the Standard Oil Company's triumph over

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\* Since the above was written, the bill has been passed by Congress, and goes to the President for his approval or disapproval.



independent trade would have been impossible. Whenever there was any approach to competition between the railroads for the traffic of the independent refineries, those interests obtained a new lease of life; when the railways suspended competition by organizing the trunk-line pool, the death-warrant of the competing refiners was sealed. Within the last year the breaking-up of the trans-continental pool ended a discrimination in favor of the Standard of fifty per cent. on the tariff rates; and just at the present time a writ of *quo warranto* has been issued against a pool of Ohio roads for discrimination against a Marietta refiner in favor of the Standard. This same principle is shown in the case of all the great discriminations. It is a fundamental law that no monopoly can be established over any extended industry by favoritism in transportation, where the competition of the carriers makes them equally anxious to obtain all the traffic; and that the combination of all the carriers to prevent competition enables discriminations to be maintained to the ruin of independent trade. The record, not only of the Standard Oil Company, but of the anthracite combination, the bituminous coal pools, the live-stock eveners, and dressed beef discriminations, the Connellsville coke syndicate, and the trans-continental freaks in the way of local discriminations and special contracts, afford a complete answer to the claim that pools prevent discriminations.

The question whether arguments of this sort will succeed in defeating the enactment of the inter-state commerce bill will probably be decided before this edition reaches the public. Supposing the general impression that the bill will become a law to be correct, two important questions will be submitted to the test of practical experience. The first is whether the influences that predominate in politics will constitute and permanently maintain a commission that will be at once judicious, prudent, independent, and superior to the influence of interested parties. The second is whether even such a body will be able to cope with the evils that have for years defied the common law. There is no doubt that this bill goes nearly if not quite as far as any purely restrictive legislation can wisely go. But it must confront vast abuses

which were never so strongly intrenched as they have recently become by the policy of combination among the railways. In two cases referred to in the preceding work, important results have been reached since the first edition went to press. In the first case, that relating to the acquisition of the South Pennsylvania Railroad by the Pennsylvania Railroad, the lower court, in a strong opinion, held that the proposed purchase was in contravention of the plain prohibition of the State Constitution; and the Supreme Court of Pennsylvania surprised those who believed it subservient to the great corporation, by sustaining the preliminary injunction on appeal. While the perpetual injunction is not yet granted, this decision is regarded by most lawyers as final upon the legal question; but the Pennsylvania Railroad has carried off the spoils of victory by securing the reorganization of the Reading Railroad in its own interest, and thus excluding the South Pennsylvania from its eastern connection. The other case is that of the classification of dry-goods, mentioned in the chapter on discriminations. Three years of discussion and of effort by the New York Commission, to apply "moral influence," failed to make any impression on that inequality of the railway tariffs. But when, last summer, the dry-goods merchants of New York determined to appeal to a court of equity, although there were few or no precedents, the railways at once changed their policy, and conceded a change which amounted to a reduction in rates of thirty-three per cent. The resistance of the railways for three years to "moral influence," followed by such concessions, suddenly made in prospect of an appeal to the courts, shows the relative value of the two remedies.

The tendency during the past year has been very strong towards the restraint of railway abuses by legislation; and as already said, the prospects are favorable for the early passage of a law which will give that policy a more earnest and thorough trial than seemed possible two years ago. Yet the result of that experiment may confirm the conclusion we have reached in other ways, that the only permanent remedy for these evils is entirely to uproot the exclusive privileges by which they are created and maintained.

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